APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 06-1867 06-2662, 06-2714 & 06-2843

IN THE MATTER OF:

UAL CORPORATION (PILOTS' PENSION PLAN TERMINATION)

APPEALS OF:

UNITED AIRLINES, INC.; PENSION BENEFIT GUARANTY CORPORATION; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; AND UNITED RETIRED PILOTS BENEFIT PROTECTION ASSOCIATION, *et al.*

Appeals from the United States. District Court
for the Northern District of Illinois, Eastern Division.
Nos. 05 C 6220 (John W. Darrah, *Judge)* and
06 C 1222 (Joan Humphrey Lefkow, *Judge).*

ARGUED SEPTEMBER 26, 2006—DECIDED OCTOBER 25, 2006

Before BAUER, POSNER, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Earlier this year we held that United Airlines and its unionized pilots had reached a valid bargain in which the pilots' union, in order to improve United's chance of successful reorganization in bankruptcy, agreed not to oppose its termination of its defined-benefit pension plan. *In re UAL Corp. (URPBPA)*, 443 F.3d 565 (7th

Cir. 2006) (*URPBPA I*). In exchange for their acquiescence, the active pilots stood to receive $550 million in convertible notes in the reorganized firm, plus a new defined-contribution pension plan.

This agreement contemplated that United would maintain the defined-benefit plan through the end of June 2005, though without making additional monthly contributions to the plan's trust fund. During those months, pilots' accrued benefits would rise because of additional work credits, and an annual cost-of-living increase-would kick in. When the defined-benefit plan ended, all pilots (active and retired) would continue to receive reduced monthly benefits. "Termination" of a plan does not end anyone's right to receive vested benefits; it just prevents an increase in those benefits, which will be paid from the trust and, to the extent that fund is insufficient, by the Pension Benefit Guaranty Corporation. (What the PBGC can pay is limited by 29 U.S.C. §1322(b)(3), so vested benefits of well-paid retirees such as airline pilots are not fully-insured.) Because the funds in trust for the pilots' plan at United were insufficient to pay the promised benefits, termination required the PBGC to step in with a hefty federal subsidy.

The PBGC was unwilling to underwrite the extra benefits that would become vested during the first six months of 2005, benefits that the district court valued at approximately $84 million. It filed an adversary action in the bankruptcy proposing to terminate the plan at the end of 2004. Meanwhile United proposed to end the payment of supplemental retirement benefits, from its corporate funds, that exceeded what could be offered through a tax-qualified pension plan—which is to say, a plan the benefits of which are taxed to employees as they are paid after retirement, rather than when the work is performed and wages earned. (The parties refer to these payments as "non-qualified benefits," but that's a misnomer. Pension plans, and contributions to them, may or may not be "qualified" in the sense of deferring income tax from the time

wages are earned until the pensions are disbursed; particular: benefit payments always are taxable income when distributed. We therefore refer to the benefits as "supplemental," meaning supplemental to the tax-qualified pension plan, rather than as "non-qualified.") The Union (the Air Line Pilots Association, International, or ALPA) acknowledged that these benefits would end as soon as the defined-benefit pension plan terminated—for a plan's termination limits pension benefits to their vested and insured level—but the parties' agreement of January 2005 (the "Letter Agreement" for short) stipulated that this meant continuation until a court formally terminated the agreement. ALPA insists that this means the date of judicial decision, not the date of the plan's termination.

After a considerable delay caused by assignment of the PBGC's action to Chief Bankruptcy Judge Wedoff, followed by District Judge Darrah's decision (after a trial had been held in the bankruptcy court) that only a district judge could act on that non-core subject, the matter came to rest with District Judge Lefkow. She thought that $84 million would be an "unreasonable increase" in the PBGC's liability; under 29 U.S.C. §1342(a)(4), that conclusion justified termination of the pension plan at the end of 2004. 436 F. Supp. 2d 909 (N.D. Ill. 2006). But Judge Lefkow did not release this decision until June 2006. Judge Wedoff, whose authority over the supplemental pension benefits was secure under 28 U.S.C. §157(b)(1) because United's request for relief was a core proceeding, concluded in February 2005 that it must continue paying while he, then Judge Darrah, and finally Judge Lefkow, mulled over the PBGC's request to set a termination date in 2004. In October 2005 United renewed its request to cease paying—for by then the pension plan would have ended even had the PBGC not sought an earlier termination date. Judge Wedoff again denied this request but allowed United to put the supplemental retirement benefits for October and later months in a segregated account while the PBGC's suit continued. United appealed to Judge Darrah.

See 28 U.S.C. §158(a). He dismissed the appeal as "unripe" because final decision in the PBGC's adversary proceeding lay ahead.

We have consolidated four appeals from these decisions. The PBGC, the ALPA, and a group of retired pilots (the United Retired Pilots Benefit Protection Association, or URPBPA) have appealed from Judge Lefkow's order. United has appealed from Judge Darrah's refusal to decide whether it must pay supplemental benefits for October 2005. Judge Wedoff entered a separate order requiring United to pay supplemental retirement benefits through February 1, 2006, when its plan of reorganization took effect; the plan, Judge Wedoff held, superseded the Letter Agreement and allowed United to stop paying at last, even though Judge Lefkow still had not decided whether the pension plan's termination date would be in December 2004 or June 2005. United appealed that decision to Judge Darrah, who affirmed on the ground that, by not taking an interlocutory appeal under 28 U.S.C. §158(a)(3) from Judge Wedoff's order in February 2005, United had forfeited any entitlement to further review of its obligations with respect to supplemental benefits. United has filed a notice of appeal (No. 06-3489) from that decision, and both ALPA and URPBPA have filed cross-appeals (Nos. 06-3548 & 06-3559) to argue that even the confirmation of the plan did not end United's obligation to pay supplemental benefits. We have stayed briefing in those three appeals until the other appeals have been resolved, as our handling of the October 2005 supplemental benefits may well resolve the controversy about payment for ensuing months too.

Of the four appeals, the PBGC's has the distinction of not seeking any relief—for the PBGC prevailed in the district court. It proposed a termination date of December 30, 2004; the court ruled in its favor. The PBGC's nose is out of joint because the court held a trial and made its own judgment about how much extra it would have cost to keep the plan in

force until the end of June 2005, and whether that amount (which the court fixed at $84.2 million, about $17 million less than the PBGC's calculation) would be an "unreasonable increase" in federal liability. The PBGC does not want to go through such a procedure again and asks us to hold that, instead of conducting an independent inquiry, the court should have limited review to the administrative record and deferred to the PBGC's evaluation. Appellate courts do not, however, review language in district judges' opinions—we review *judgments*, see *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 439 (7th Cir. 1987), and this judgment gave the PBGC everything it wanted. A litigant that prevails at trial may not appeal to contend that it should have won faster or cheaper on summary judgment; nor may the winner at trial protest what it deems (in retrospect) to have been needless discovery or rounds of briefing en route. What the PBGC wants from us—a remand directing the district judge to write a different opinion but enter the same judgment—is not within the judicial power under Article III. Fiddling with explanatory language, when the judgment is fixed, would be advisory.

This is not to say that a prevailing litigant must abandon its views on intermediate legal questions. A winner may defend its judgment on any ground preserved in the district court, without need for a cross appeal. See, e.g., *Massachusetts Mutual Life Insurance Co. v. Ludwig*, 426 U.S. 479 (1976). The PBGC takes this as a fallback position, even if Article III precludes a remand with instructions to rewrite the opinion while reentering the same judgment. So our first question is whether review should have been deferential, for if the answer is yes then we may affirm (on ALPA's and the retired pilots' appeals) without further ado.

Deference is appropriate when agencies wield delegated interpretive or adjudicatory power—the former usually demonstrated by rulemaking and the latter by administrative adjudication (which also may yield rules in common-law

fashion). See *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001). The PBGC did not use either rulemaking or adjudication to decide that United's plan should be wrapped up at the end of 2004. Its decision was made unilaterally and was not self-executing. The only authority that the PBGC has under §1342 is to ask a court for relief. That implies an independent judicial role. See *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990). When making its decision a court must respect any regulations issued after notice-and-comment rulemaking, but the PBGC has not promulgated any rules pertinent to this subject. Nor has it issued the sort of interpretive guidelines that deserve the court's respectful consideration even though they lack the power to control. See, e.g., *Christensen, v. Harris County*, 529 U.S. 576, 587 (2000). All the PBGC had done is commence litigation, and its position is no more entitled to control than is the view of the Antitrust Division when the Department of Justice files suit under the Sherman Act. See, e.g., *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-13 (1988). As the plaintiff, a federal agency bears the same burden of persuasion as any other litigant.

Nothing in 29 U.S.C. §1342(c), which describes the judicial function after the PBGC files an action seeking termination, suggests that the court must defer to the agency's view. Nonetheless, the PBGC insists that we should look past the statutory language and follow *PBGC v. LTV Corp.*, 496 U.S. 633, 647-51 (1990), which held that the agency receives *Chevron*-style deference (see *Chevron. U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)) to the extent that it has issued opinions interpreting another of its statutes, 29 U.S.C. §1347.

Section 1347 allows the PBGC to revive a terminated pension plan. This is a unilateral act; restoration does not require judicial approval, though like other agency action it may be reviewed in court under the Administrative Procedure

Act, 5 U.S.C. §706, which requires the court to respect agency action that is not arbitrary, capricious, or in violation of law. In a series of opinion letters, the PBGC concluded that the restoration power should be used when employers create follow-on plans. A "follow-on plan" is one that wraps around the federal insurance program and gives current and retired employees substantially the same benefits they would have enjoyed had the original plan not been terminated. LTV's pension plan was underfunded by about $2.3 billion, and when the plan was terminated in LTV's bankruptcy the federal insurance fund had to make up about $2.1 billion of that shortfall. LTV and its unions then negotiated a new pension plan that, when added to the federal insurance benefits, gave workers and retirees the same retirement income they would have enjoyed had the plan not been terminated. Investors and workers thus did not share the pain; all loss from the employer's imprudently high pension promises fell on the taxpayers. The PBGC, following its long-held views, concluded that the termination-and-follow-on procedure amounted to a raid on the Treasury and restored the plan under §1347—a step that ended the federal insurance benefits and required LTV to make up the $2.3 billion funding shortfall on its own. The Supreme Court held that by doing this the PBGC did not contradict § 1347 or abuse its discretion.

Although the agency wants us to conclude that *LTV* entitles all of its acts to *Chevron* deference, that is not what the Court held. Section 1347 enables the PBGC to make self-executing orders, which is what leads to deferential review under the APA. Section 1342, by contrast, requires the PBGC to initiate litigation. Review under the APA differs substantially from the sort of position that an agency must assume when, like any other litigant, it must demonstrate a preponderance of the evidence in order to prevail. See *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). After *Mead* and *Christensen*, the sort of opinion letters to which the Court deferred in *LTV* would receive, not *Chevron* deference, but respectful

consideration under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). As it happens, the difference between *Chevron* and *Mead-Skidmore deference* does not matter today, because the PBGC has not issued any opinion letters that bear on the disposition of this litigation. It demands deference not to its policies but to a fact-specific conclusion that the Letter Agreement between United and the ALPA exposed the insurance fund to an "unjustified increase" in liability. Section 1342(c) gives the resolution of that question to the judiciary; the PBGC participates as a litigant, not as the decision-maker.

The question that Judge Lefkow had to resolve was not whether United's plan will terminate—the requirements for a distress termination have been met no matter what the PBGC thinks, and the Letter Agreement removes the obstacle otherwise present when a collective-bargaining agreement is involved, see 29 U.S.C. §1341(a)(3), (c)(2) (B)(ii)—but what the effective day of that termination would be. The retired pilots' appeal fails to reckon with the limits of this litigation. What the retirees want is nothing less than indefinite continuation of the plan. If American Airlines can afford a pension plan, the retired pilots insist, then so can United Airlines. That's water under the bridge, however. *URPBPA I* holds that United and the ALPA were entitled to agree on the plan's termination. A companion decision, released today, reiterates that conclusion in rejecting the retired pilots' objections to the plan of reorganization, which ends any possibility of resurrecting this pension plan. See *In re; UAL Corp.*, No. 06-2780 (7th Cir. Oct. 25, 2006). No more need be said about the retired pilots' appeal.

While United and its unions' were negotiating, United and the PBGC had their own round of discussions. An employer that terminates an underfunded plan becomes liable to the PBGC for the amount of the shortfall. 29 U.S.C. §1362. United was in economic distress and could not satisfy that obligation in liquid assets; the PBGC agreed to accept about

$1.5 billion of stock in the post-reorganization United. As part of this bargain, the PBGC agreed that United could continue three of its pension plans (those covering flight attendants, mechanics, and general office personnel) through June 30, 2005. The PBGC reserved its right to seek earlier termination of the pilots' plan under §1342(a)(4); United, which had given the ALPA a most-favored-nations agreement (promising that it would not end the pilots' plan before the plans covering other workers) kept its bargain and refused to accede to the PBGC's demand, which led to the adversary action. Now the ALPA contends that, by accepting equity securities in lieu of cash on account of the employer's shortfall liability, the PBGC has forfeited its right to seek early termination. But how so, when the settlement agreement expressly reserved the right to seek this relief? It is not as if United topped up the pension trust to cover the additional benefits that would become vested during the first six months of 2005. It stopped contributing to the pilots' plan in 2002, when the bankruptcy began, and the offer of stock in (partial) satisfaction of the shortfall would not have mitigated the loss to the federal insurance fund from adding six more months of vested benefits in 2005.

So is $84 million, the (net) cost to the PBGC of continuing the pilots' plan through the first six months of 2005, an "unreasonable increase" in federal liability? Reasonableness is an issue of fact and is reviewed deferentially on appeal; that reasonableness is "the ultimate issue" does not change that standard. See *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). The dispute is case-specific, which almost always implies deferential appellate review. See, e.g., *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401-02 (1990); *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 933 (7th Cir. 1989) (en banc).

The pilots' union maintains that $84 million is not an unreasonable increase because it is small in relation to the

total obligations of the plan (several billion dollars), the assets in the PBGC's insurance fund, the cost of an aircraft carrier, or the national government's annual budget. That is not, however, the right perspective. Any number can be made to look trifling by comparing it with some much larger number, but the exercise is so easy that the comparison is unhelpful. Eighty-four million dollars is substantial by any normal calculation. The district court concluded that the right question is whether the federal Treasury receives value for money; if not, the marginal outlay is "unreasonable." This $84 million would not buy the insurance fund anything of value. Nor was it necessary to provide the pilots with a minimally satisfactory retirement: they are well compensated even after the termination, since many will receive benefits at the. statutory maximum.

The incremental $84 million was a bargaining chip between United and the Union: to obtain ALPA's assent to the termination, United offered the pilots an extra six months of benefits to be underwritten by a third party, the PBGC. No wonder it objected. The deal between United and the unions exemplifies the moral hazard to which insurance gives rise. Insured parties alter their behavior to take advantage of the third-party payor; insurers must respond by making such maneuvers more difficult. That's why the PBGC proposed early termination. The district court did not abuse its discretion in concluding that any extra outlay attributable to the moral hazard created by insurance would be an "unresonable increase" in the federal commitment, given the substantial amount that the PBGC already was committed to pay toward the pilots' benefits.

Once the PBGC files suit, the district court sets the termination date. 29 U.S.C. §1348(a)(4). The pilots' union maintains that December 30, 2004, is too early even if June 30, 2005, is too late, but the district judge was not required to split the difference between the ALPA and the PBGC. That

United had promised the Union not to agree to a date before June 30 does not affect either the PBGC or the court, for they are strangers to the bargain.

As for the supplemental payments: these end with the defined-benefit plan, which means that nothing is due for October 2005 or later. (United has not proposed to recapture payments disbursed for January through September 2005.) When Judge Darrah dismissed United's appeal as "unripe," Judge Lefkow had not yet made her decision, so Judge Darrah could not be sure where in the range December 2004 through June 2005 the pilots' plan would end, but any of the possible dates came before October 2005, so it is unclear why Judge Darrah thought the appeal premature. If the supplemental benefits end at the plan's termination, then reversal was in order; if, as ALPA insists, the benefits continue until a court makes the final decision, then affirmance was in order (for the termination-date dispute remained unresolved as of October 2005); it is impossible to understand why Judge Darrah thought that there was nothing to' do but dismiss the appeal.

Indeed, it is impossible to see how an appeal *ever* could be dismissed as "unripe," and Judge Darrah did not cite any statute or case law in support of his decision. Ripeness is quality of *disputes,* not of appeals. If the dispute about whether United must pay the supplemental benefits for October 2005 was not ripe for resolution, then the district court should have vacated Judge Wedoff's decision as premature. For appellate tribunals (including district judges deciding appeals in bankruptcy), the relevant doctrine is finality, not ripeness. See *United States v. Jose*, 519 U.S. 54 (1996). If the *order* is final, then an appeal is proper whether or not the *dispute* is ripe for resolution. A timely appeal filed after premature action by the lower court can lead to one of two actions: the appellate body vacates the premature decision, or the appellate body keeps the dispute under advisement until it becomes ripe and a

decision properly may be rendered. See *Buckley v. Valeo*, 424 U.S. 1, 114-17 (1976) (dispute resolved on the merits on appeal, even though the controversy was not ripe at the time the district court acted). If the dispute is ripe, then it must be resolved on the merits—as Judge Darrah later was to do for the months November 2005 through January 2006, even though Judge Lefkow still had not fixed the plan's termination date. Dismissal of the appeal, leaving the aggrieved party without recourse (it can't file a second notice of appeal later, for the time to appeal will have expired), is the one impermissible outcome, expressly forbidden by *Jose*.

It is unnecessary to remand, since we can resolve this legal dispute as easily as the district court could (and without the need for a second round of appeals). There are three possible resolutions. First, United's obligation to pay supplemental benefits may end with the plan, and if that is so then it need not pay supplemental benefits for October. Second, United's obligation may continue as long as the dispute about the termination date is still in litigation, and if that is so then United must pay supplemental pension benefits for October 2005. Third; United may have forfeited its legal rights by failing to appeal in February 2005, and again, this means that it must pay the October benefits. It is this third conclusion that Judge Darrah reached when he resolved the appeal with respect to benefits for November through January, see 2006 U.S. Dist. LEXIS 66305 (N.D. Ill. Aug. 30, 2006), and that ALPA urges us to adopt with respect to the October 2005 benefits.

Lawyers often argue that failure to take an available interlocutory appeal forfeits any opportunity to present the argument later, but this proposition has not fared well. See, e.g., *United States v. Clark*, 445 U.S. 23, 25 n.2 (1980) (citing lots of earlier decisions holding that failure to take an interlocutory appeal does not waive or forfeit any legal position); *Kurowski v. Krajewski*, 848 F.2d- 767 (7th Cir. 1988). Thirty

years ago we called "frivolous" an argument that failure to take an interlocutory appeal forfeits the litigant's position. *Tincher v. Piasecki*, 520 F.2d 851, 854 n.3 (7th Cir. 1975). It has not gained support in the intervening years, so it is surprising to see it adopted by a district judge—whose terse opinion does not cite any authority. Litigants bypass opportunities for interlocutory review all the time. For example, a decision to issue (or deny a motion for) a preliminary injunction is an appealable order, but a litigant who decides to accept defeat at that stage and proceed straight to resolution of the permanent injunction does not thereby give up all chance of prevailing on the merits. *Retired Chicago Police Association v. Chicago*, 7 F.3d 584, 608 (7th Cir. 1993). Likewise public officials who could appeal before trial to present claims of official immunity need not do so, and they may raise an immunity defense on appeal from the final decision. That's the holding of *Kurowski*. As we remarked there (848 F.2d at 773):

> The privilege to take an interlocutory appeal exists for the appellant's protection. Such appeals come at great cost to the judicial system because they may prolong litigation and require appellate courts to cope with each case more than once. Most interlocutory appeals end in affirmance (thus entail wasted motion), because district judges dispose correctly of the vast majority of motions. If the aggrieved party is content to swallow his losses and proceed with the case . . . no interest of either the judicial system or the adverse party is served by treating the whole subject as forfeit. That would simply induce [litigants] to file more interlocutory appeals

Just so with interlocutory appeals in bankruptcy. If United was willing to pay the supplemental retirement benefits for February 2005, and let the subject slide until October, that was its own loss (and the retirees' gain); a legal rule declaring the legal position lost forever would lead prudent lawyers to

file appeals early and often, pouring molasses on the judicial process.

Thus the only remaining question is whether the Letter Agreement between United and ALPA compels United to pay supplemental retirement benefits until the judiciary sets the termination date. The Letter Agreement provides that the pilots' plan will terminate at the close of June 2005, and that until the court acts—for termination of an underfunded plan at the employer's behest requires judicial approval under 29 U.S.C. §1341(c)(2)(B)(ii)—the plan "shall remain in full force and effect". (Although the Letter Agreement does not refer to the supplemental benefits, everyone assumes that their treatment matches that of regular pension benefits.) The Agreement's "full force and effect" clause applies until all appeals from the bankruptcy judge's decision about the distress termination have been exhausted, or the plan of reorganization has come into force. This is the language that, as the ALPA sees things, requires the continuation of supplemental benefits until February 1, 2006, when the plan of reorganization took effect.

The problem with this line of argument is that, by the time the bankruptcy judge approved the Letter Agreement, the PBGC had taken matters out of United's hands by asking the court to terminate the pension plan earlier. There never was to be a proceeding under §1341(c)(2)(B)(ii). Nor was termination to wait until some judicial decision or appeal; what the PBGC wanted—and what the district court gave it, properly we have just held—is retroactive termination. That pulled the rug out from under the Letter Agreement's fundamental assumption about timing. United and the ALPA spoke only for themselves; they could not speak for the court, the PBGC, or United's other unsecured creditors. If, as the parties have agreed, the supplemental benefits end with the pension plan, the only possible date for that cessation is December 30, 2004.

Section 1342(a)(4) allows a court (at the PBGC's request) to override private agreements. See also *In re UAL Corp.*, 428 F.3d 677 (7th Cir. 2005) (holding that action of the PBGC overrode the pension clauses in a collective bargaining agreement between United and the flight attendants' union). United and its unions lacked authority to set a termination date once the PBGC intervened, and a side agreement that all benefits persist until a privately selected termination date is untenable when the court sets its own date. Maintaining the supplemental benefits—which are defined as the difference between the contractually agreed pension payments and what an ERISA plan can provide—after the Plan's termination date would make the supplements a kind of follow-on plan, designed to maintain the retirees' position (through the plan of reorganization) while transferring as much of the obligation as possible to the public fisc. For the reasons given in *LTV,* that is incompatible with the PBGC's insurance function.

Indeed, the "full force and effect" clause of the side agreement is untenable (as applied to the supplemental benefits) quite apart from §1342(a)(4). The supplemental benefits were deferred compensation for labor the retired pilots furnished before United entered bankruptcy. The retirees were unsecured creditors with respect to these benefits. The defined-benefit pension plan itself was supported by a trust fund, but because paying these extra benefits through the trust would have cost both United and the pilots the value of tax deferral, these supplemental payments were kept separate from the trust. As a debtor in bankruptcy, United had no power to pay one group of unsecured creditors in full while sending most others away with less than 10 cents on the dollar, and the bankruptcy court lacked authority to approve any such preference over protest. See *In re Kmart Corp.*, 359 F.3d 866 (7th Cir. 2004). No one has argued that the court's authority to classify debts would support a difference of this magnitude. Nor can the supplemental benefits be paid in full as current wages covered by the priority in 11 U.S.C.

§507(a)(3)(A) (preference for wages, not to exceed $4,925 per employee, earned during the 90 days before bankruptcy commences). They are neither current nor wages.

Payment of these sums therefore has been problematic from the outset of the bankruptcy. Given the parties' agreement that these benefits do not (as a matter of pre-bankruptcy contract) outlast the pension plan, it does not make sense to mandate their continuation after the plan's termination date, at 100 cents on the dollar, while other unsecured creditors get much less. United therefore is not required to make the payments for October 2005 or later months. What the retirees are entitled to is not full payment but an unsecured claim equal to the value of these benefits. (We discuss the handling of that unsecured claim in the companion opinion, No. 06-2780, slip op. 6.)

This does not mean that "United" becomes wealthier at the retirees' expense. "United" is just a collective name for all stakeholders. Old unsecured debts were converted to equity in the reorganized United, so money: in the firm's bank account is value to the former unsecured creditors, who obtain a (very slightly) larger return on their loans. (As we have mentioned; both active and retired pilots are among these unsecured creditors.)

The PBGC's appeal (No. 06-2843) is dismissed for want of jurisdiction because it requests an advisory opinion. On the appeals of ALPA and the URPBPA (Nos. 06-2662 and 06-2714) the judgment terminating the pilots' pension plan as of December 30, 2004, is affirmed. On United's appeal (No. 06-1867) with respect to the October benefits order, the judgment is reversed and the case is remanded with instructions to enter a judgment allowing United to reclaim the contents of the segregated fund.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

Case Number: 06 C 1222

PENSION BENEFIT GUARANTY CORPORATION,

v.

UNITED AIR LINES, INC., *et al.*

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the court decrees that the United Airlines Pilot Defined Benefit Pension Plan is terminated as of December 30, 2004.

Michael W. Dobbins, Clerk of Court

Date: 6/13/2006 /s/ Michael Dooley, Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 06 C 1222
Judge Joan H. Lefkow

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff,

v.

UNITED AIR LINES, INC., as Plan Administrator for the United Airlines Pilot Defined Benefit Pension Plan,
Defendant,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, UNITED RETIRED PILOTS BENEFIT PROTECTION ASSOCIATION, ROGER D. HALL, DENNIS D. DILLON, GERARD TERSTIEGE, EUGENE M. CUMMINGS, RAYMOND P. FINK, JAMES M. KRASNO and WILLIAM L. RUTHERFORD,
Intervenors.

MEMORANDUM OPINION AND ORDER

This case arises from the decision of the Pension Benefit Guarantee Corporation ("PBGC") to seek a judicial decree authorizing the involuntary termination of a pension plan sponsored by United Airlines, Inc. ("United"). The court referred this matter to the bankruptcy court, where United's Chapter 11 bankruptcy was pending in front of the Honorable Eugene R. Wedoff. Following a trial, this matter has returned to this court accompanied by the bankruptcy court's proposed findings of fact and conclusions of law. The bankruptcy court recommended finding that PBGC met its burden of estab-

lishing that termination of the United Airlines Pilot Defined Benefit Pension Plan was necessary to avoid an unreasonable increase in PBGC's liability under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1342(c), with an effective termination date of December 30, 2004. Also before the court are the objections of PBGC, the Airline Pilots Association ("ALPA"), International, and the United Retired Pilots Benefit Protection Association ("RPA") to the bankruptcy court's proposed findings of fact and conclusions of law. For the reasons stated below, the court accepts the recommendations of the bankruptcy court as modified.

I. BACKGROUND

Although the parties are abundantly familiar with the events leading up to the present decision, for the sake of completeness, the court will provide a brief recapitulation of the background of this case.

A. The Pilot Plan

Pursuant to a collective bargaining agreement between United and Airline Pilots Association, International, the exclusive collective bargaining representative of United's pilots, United maintained the United Airlines Pilot Defined Benefit Pension Plan (the "Pilot Plan") and served as the plan sponsor and administrator.

United and twenty-seven related corporations filed voluntary Chapter 11 cases in the bankruptcy court on December 9, 2002. Thereafter, United entered into negotiations with ALPA regarding the Pilot Plan. United and ALPA ultimately reached an agreement to modify the collective bargaining agreement to eliminate the pension plans created by the collective bargaining agreement. On December 17, 2004, United filed a Motion to Approve Letter of Agreement Modifying Their Collective Bargaining Agreement with ALPA. The

bankruptcy court denied this initial motion but later approved a modified version of the agreement. Both versions of the agreement provided, *inter alia*, that ALPA would not "oppose the Company's efforts to terminate the A Plan under 29 U.S.C. § 1341(c)" as long as United did not seek to terminate the Pilot Plan before May 2005. Both versions further provided that the Pilot Plan would "remain in full force and effect" until United met the requirements for a distress termination under 29 U.S.C. § 1341, and that nothing in the Letter of Agreement "shall be construed, deemed or characterized by UAL or the Company as any agreement of any form by the Association that the A Plan should be terminated."

The United Retired Pilots Benefit Protection Association ("URPA"), which is an Illinois not-for-profit corporation created to protect the benefits of United's retired pilots, had attempted to participate in the negotiations, but United did not permit URPA's participation. URPA filed a motion in the bankruptcy court which asked for the appointment of an authorized representative to represent United's retired pilots and their pension benefits. The bankruptcy court denied this motion, which both the district court, *per* Judge Darrah, and the Seventh Circuit Court of Appeals upheld on appeal.

B. PBGC

PBGC is a federal corporation established under 29 U.S.C. § 1302(a) to administer the insurance program for defined benefit pension plans created under Title IV of ERISA, 29 U.S.C. §§ 1301-1461. PBGC guarantees certain benefits under ERISA pension plans and has authority pursuant to ERISA to terminate underfunded pension plans. *See* 29 U.S.C. § 1342.

In December of 2004, PBGC determined that the Pilot Plan should be terminated in order to avoid an unreasonable increase in PBGC's liability. United refused to consent to a termination of the Pilot Plan. On December 29, 2004, the

Executive Director of PBGC issued a Notice of Determination, which provided

> [T]he Pension Benefit Guaranty Corporation ("PBGC") has determined, under section 4042(a)(4) of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), 29 U.S.C. § 1342(a)(4), that the United Airlines Pilot Defined Benefit Pension Plan ("Plan") must be terminated because the possible long-run loss of the corporation with respect to the Plan may reasonably be expected to increase unreasonably if the Plan is not terminated. PBGC further determined, under ERISA § 4042(c), 29 U.S.C. § 1342(c), that the Plan must be terminated in order to avoid any unreasonable increase in the liability of the fund. Accordingly, PBGC intends to proceed under ERISA § 4042, 29 U.S.C. § 1342, to have the Plan terminated and PBGC appointed as statutory trustee, and under ERISA § 4048, 29 U.S.C. § 1348, to have December 30, 2004, established as the Plan's termination date.

That same day, PBGC sent the Notice of Determination to United and ALPA via overnight mail, which ALPA received on December 30, 2004. Also on December 30, the Notice of Determination was published nationally in *USA Today* and in newspapers serving United's hubs, including *The Chicago Tribune, The Washington Post, The Los Angeles Times, The San Francisco Chronicle, The Denver Post*, and *The Rocky Mountain News*. Additionally, PBGC, United, and ALPA published press releases on their websites announcing PBGC's decision to seek termination of the Pilot Plan.

On December 30, 2004, PBGC filed a complaint in this court against United as administrator of the Pilot Plan, seeking a decree of termination of the Pilot Plan pursuant to § 1342(c) of ERISA.

C. Referral of Proceedings by This Court to the Bankruptcy Court

On January 4, 2005, United filed an Emergency Motion to Confirm Automatic Referral to the United States Bankruptcy Court for the Northern District of Illinois Pursuant to Internal Operating Procedure 15(a), arguing that PBGC's complaint fell within the bankruptcy court's "related to" jurisdiction under 28 U.S.C. § 157(a) and requesting that the case be assigned to the bankruptcy court overseeing United's Chapter 11 proceedings. In opposing United's emergency motion, PBGC argued that the bankruptcy court did not have jurisdiction over PBGC's complaint because the structure of ERISA's pension plan termination provisions and the language of 29 U.S.C. § 1342(c) provided for exclusive jurisdiction in "the appropriate United States District Court."

On January 25, 2005, this court granted United's emergency motion and transferred the case to the bankruptcy court. The bankruptcy court subsequently granted the motions to intervene of ALPA, URPA, and certain individual retired pilots. PBGC moved this court to reconsider the referral to the bankruptcy court or, in the alternative, for a certification to file an interlocutory appeal.[1]

D. Bankruptcy Court Proceedings

On April 13, 2005, the bankruptcy court determined that it would permit discovery beyond PBGC's administrative record. PBGC moved for summary judgment on June 6, 2005, arguing that its decision to seek a termination of the Pilot Plan was entitled to judicial deference and that its decision to initiate termination had not been arbitrary or capricious. PBGC further argued that the notice provided to the plan participants was sufficient to set the termination date as of December 30, 2004. United, ALPA, and URPA opposed PBGC's motion for summary judgment.

---

[1] This motion was terminated in error on September 9, 2005.

The bankruptcy court issued a preliminary ruling on PBGC's motion for summary judgment on August 25, 2005. The bankruptcy court subsequently issued an Amended Memorandum of Decision on Motion for Summary Judgment on October 26, 2005, ruling that PBGC's adversary proceeding was a core proceeding. As a consequence, the bankruptcy court entered a final judgment. In this judgment, the bankruptcy court held that a trial was required as to whether PBGC established the propriety of terminating the Pilot Plan by a preponderance of the evidence; that § 1342(c) required *a de novo* determination of the appropriateness of the Pilot Plan termination, and not a deferential review under the Administrative Procedure Act; and that the constructive notice to the Pilot Plan participants was sufficient to establish a termination date of December 30, 2004.

Following a bench trial, the bankruptcy court issued a Memorandum of Decision, holding that PBGC had showed that continued operation of the Pilot Plan beyond December 30, 2004 would result in an unreasonable increase in liability of PBGC's fund, and as a result, PBGC was entitled to a decree terminating the Pilot Plan pursuant to 29 U.S.C. § 1342(c) as of December 30, 2004. On October 28, 2005, the bankruptcy court entered its order retroactively terminating the Pilot Plan to December 30, 2004.

E. Appeal from the Bankruptcy Court Proceedings Before Judge Darrah

Thereafter, on November 4, 2005, ALPA filed a notice of appeal in the district court. URPA filed its notice of appeal on November 7, 2005. PBGC filed a cross-appeal on November 16, 2005. These appeals from the bankruptcy court's final orders were assigned to Judge Darrah, Civil Case No. 05 C 6955.

PBGC raised three issues on appeal: (1) the district court erred in referring the termination proceeding to the bank-

ruptcy court; (2) the bankruptcy court erred in finding that the termination was a core proceeding; and (3) the bankruptcy court erred by holding *a de novo* trial. PBGC, however, did not file a timely notice of appeal, and Judge Darrah dismissed PBGC's cross-appeal as untimely.

Because PBGC and URPA had challenged the bankruptcy court's jurisdiction, an issue that may be raised at any time, Judge Darrah considered their arguments that the bankruptcy court did not have jurisdiction to enter a final judgment in the termination proceeding because the termination was not a core proceeding. Judge Darrah ruled that the termination proceeding filed by PBGC pursuant to Title IV of ERISA was a non-core proceeding. Accordingly, the bankruptcy court had exceeded its limited jurisdiction by issuing a final judgment rather than submitting proposed findings of fact and conclusions of law to the district court, as required by § 157(c)(1). Judge Darrah reversed the final judgments of the bankruptcy court and remanded the case for proceedings consistent with 28 U.S.C. 157(c). Judge Darrah then dismissed the appeals of ALPA and URPA as moot.

F. Remand to the Bankruptcy Court and Subsequent Appeal of the Bankruptcy Court's Proposed Findings of Fact and Conclusions of Law to This Court

On February 13, 2006, the bankruptcy court adopted as its recommendation to the district court the two previously issued memoranda, with the exception of those portions of the memoranda that addressed its jurisdiction, issuing its proposed findings of fact and conclusions of law on the motion for summary judgment and the subsequent trial.

On February 24, 2006, PBGC filed its objections to the bankruptcy court's proposed findings of fact and conclusions of law to which United, ALPA, and URPA responded. ALPA and URPA also have filed objections to the bankruptcy court's proposed findings and conclusions to which PBGC responded. These objections are presently before this court.

II. STANDARD OF REVIEW

In non-core proceedings, *i.e.*, cases that are not directly related to matters arising under Title 11, the bankruptcy court must submit proposed findings of fact and conclusions of law to the district court. 28 U.S.C. § 157(c)(1). The district court then conducts *a de novo* review of the bankruptcy court's proposed findings of fact and conclusions of law to which a party has made a specific written objection. *Id.;* Fed. R. Bank. Proc. 9033(d). The district court may accept, reject, or modify the proposed findings of fact and conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instructions. Fed. R. Bank. Proc. 9033(d).

III. ANALYSIS

PBGC objects to the bankruptcy court's proposed findings of fact and conclusions of law on the ground that the bankruptcy court applied the *de novo* standard when it reviewed PBGC's decision to terminate the Pilot Plan rather than reviewing PBGC's determination on the administrative record under the arbitrary and capricious standard. PBGC also requests that this court reconsider and reverse its decision referring the involuntary termination proceeding to the bankruptcy court. PBGC asks this court to hold that it will review PBGC's termination decision on the agency's administrative record under the arbitrary and capricious standard. Finally, PBGC seeks an order that the parties promptly submit summary judgment motions on the issue of whether PBGC's determination that the Pilot Plan should be terminated w[illegible] arbitrary and capricious.

Both ALPA and URPA object to the bankruptcy court's conclusion that PBGC met its burden of proof that the Pilot Plan should be terminated, effective December 30, 2004, under § 1342(c). ALPA further argues that PBGC was required to provide individualized notice to each of the approximately 15,000 participants of the Pilot Plan. The court will address each argument in turn.

A. Referral to the Bankruptcy Court

As a preliminary matter, PBGC requests that this court reconsider its referral of PBGC's action to terminate the Pilot Plan to the bankruptcy court. A motion for reconsideration serves the limited function to correct manifest errors of law or fact or to present newly discovered evidence, and whether to grant such a motion is within the discretion of the court. *Caisse Nationale Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1269-70 (7th Cir. 1996). The problems warranting such a grant are rare. *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990) (citation omitted). The motion also serves a valuable function where the court "has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." *Id.*

While PBGC contested the court's referral of the action to the bankruptcy court, PBGC ultimately prevailed in the bankruptcy court. The court sees no reason to reconsider the referral at this late stage in the proceedings, particularly when PBGC is only raising arguments that the court considered and rejected previously. As a consequence, PBGC's motion to reconsider is denied.

B. Appropriate Standard of Review for an Involuntary Termination Action Under 29 U.S.C. § 1342(c)

Title IV of ERISA establishes the exclusive means for terminating a defined benefit pension plan regulated by statute. 29 U.S.C. § 1341(a). In enacting section 1342(c) of ERISA, Congress authorized PBGC to institute proceedings to terminate a plan whenever PBGC determines that one of four enumerated circumstances exists.[2] 29 U.S.C. § 1342(a)(1)-(4).

---

[2] 29 U.S.C. § 1342(a) states:

> The corporation may institute proceedings under this section to terminate a plan whenever it determines that—

As relevant to the present matter, PBGC may institute proceedings to terminate a plan when PBGC determines that "the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated." 29 U.S.C. § 1342(a)(4). After determining that one of the enumerated circumstances exists, PBGC may enter into an agreement with the plan administrator to terminate the plan, which does not require a court adjudication. If, however, the plan administrator does not agree to a termination of the plan, after issuing notice to the plan administrator, PBGC may "apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants

---

> (1) the plan has not met the minimum funding standard required under section 412 of Title 26, or has been notified by the secretary of the Treasury that a notice of deficiency under section 6212 of Title 26 has been mailed with respect to the tax imposed under section 4971(a) of Title 26,
>
> (2) the plan will be unable to pay benefits when due,
>
> (3) the reportable event described in section 1343(c)(7) of this title has occurred, or
>
> (4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

The corporation shall as soon as practicable institute proceedings under this section to terminate a single-employer plan whenever the corporation determines that the plan does not have assets available to pay benefits which are currently due under the terms of the plan. The corporation may prescribe a simplified procedure to follow in terminating small plans as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c) of this section). Notwithstanding any other provision of this subchapter, the corporation is authorized to pool assets of terminated plans for purposes of administration, investment, payment of liabilities of all such terminated plans, and such other purposes as it determines to be appropriate in the administration of this subchapter.

or to avoid any unreasonable deterioration of the plan or any unreasonable increase in the liability of the fund." 29 U.S.C. § 1342(c).

The threshold issue for the court to determine is whether, under 29 U.S.C. § 1342(c), a court may issue a decree terminating a pension plan if parties opposing termination fail to establish that PBGC acted arbitrarily in seeking termination, or whether PBGC must affirmatively establish grounds for termination. The bankruptcy court concluded that § 1342(c) of ERISA requires *a de novo* determination of the appropriateness of an involuntary plan termination. PBGC challenges this conclusion, arguing that the court should review PBGC's termination decision on the administrative record under the arbitrary and capricious standard. PBGC argues that since there is nothing in the applicable ERISA provisions demonstrating that the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, *et seq.,* does not apply to the decision of PBGC, the court should apply the default standard of the APA, 5 U.S.C. § 706(2)(A),[3] and ask whether PBGC's determination was arbitrary and capricious. For the reasons stated below, this court agrees with the bankruptcy court that § 1342(c) requires the court to determine *de novo* the appropriateness of an involuntary plan termination.

First, § 704 states, "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." Section 1342(c) establishes an "other adequate remedy," namely, a decree from the appropriate district court adjudicating that a plan must be terminated. By providing as such,

---

[3] The APA authorizes a court to set aside an administrative determination only on a showing that the determination is either (1) "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or (2) "unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court," 5 U.S.C. § 706(2)(F).

the express language of § 1342(c) removes involuntary termination actions from the purview of the APA.

Second, in issuing a decree adjudicating the appropriateness of a plan termination, the court, unlike PBGC, must consider the factors specified in § 1342(c). The statute empowers the court to determine whether a termination is required based on a need "to protect the interests of the participants, to avoid any unreasonable deterioration of the financial condition of the plan or to avoid any unreasonable increase in the liability of the fund." 29 U.S.C. § 1342(c). Yet, it is not necessary for PBGC to consider these factors in determining that a plan must be terminated in the first instance. *See 29* U.S.C. §1342(a), *supra,* note 5. While there is only a subtle difference between the factors considered by PBGC and the court, by setting forth these criteria for the court to consider, Congress implicitly rejected the arbitrary and capricious standard. Additionally, the standard of review under the arbitrary and capricious standard cannot be reconciled with the requirement that the court consider factors other than those on which PBGC relied for its determination. "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 at 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983), *quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962). In reviewing the explanation of the agency, the court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id., quoting Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 at 285, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974); *Citizens to Preserve*

Overton Park v. Volpe, 401 U.S. 402 at 416, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971). A judicial decree adjudicating that a plan must be terminated must consider more than the factors on which PBGC relied for its determination. As such, review under the arbitrary and capricious standard is inappropriate.

Third, the plain language of § 1342(c) establishes that the proceeding in the court is an adjudication and not merely an enforcement or review of PBGC's prior determination. The court agrees with PBGC that PBGC must make the determination in the first instance that a plan must be terminated; however, PBGC construes § 1342 as requiring a single determination. In fact, the statute calls for two determinations: the initial determination of PBGC that the plan must be terminated because of the existence of one of the factors specified in § 1342(a) and the subsequent determination of the court that the plan must be terminated based on the factors specified in § 1342(c). Only after PBGC makes its determination may it institute proceedings. *See* 29 U.S.C. § 1342(a) ("The corporation may institute proceedings under this section to terminate a plan whenever it determines that [one of the enumerated circumstances exists.]"). Thus, PBGC's determination cannot be described as the culmination of a plan termination.

Fourth, the judicial decree functions as a "substantial safeguard" for the rights of parties other than PBGC affected by plan termination, and deferential review of agency decision-making in that regard is incompatible with the judicial decree requirement. In § 1342(a), Congress established that with respect to "small plans" PBGC may establish a simplified procedure for termination "as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c) of this section)." 29 U.S.C. § 1342(a). The statute requires "substantial safeguards" for

plan participants, beneficiaries, and sponsors. While PBGC has no interest in unnecessarily incurring liability for an unfunded plan, but it also has statutory responsibilities to protect participants and beneficiaries, and employers who pay premiums to PBGC. PBGC's interests are not necessarily furthered by allowing a plan to continue or in seeking to maximize the benefits of plan participants and beneficiaries. Thus, the court acts as a safeguard, thereby ensuring that the termination of a particular plan is required, and deferential review of agency decision-making is inconsistent with this responsibility.

The court acknowledges that the application of the *de novo* standard to an involuntary termination proceeding is a departure from the decisions of other district courts. In fact, this court initially saw the advantage of applying the arbitrary and capricious standard of the APA to PBGC's determinations when deciding whether to issue a decree under § 1342(c). Certainly, the arbitrary and capricious standard has its appeal in terms of streamlining the analysis and relying on the expertise of the PBGC. *See In re Pan Am. World Airways, Inc. Co-op. Retirement Income Plan*, 777 F. Supp. 1179, 1181-82 (S.D.N.Y. 1991) (reasoning that because there is nothing in the applicable ERISA provisions to show that the 5 U.S.C. §§ 706(2)(A) or (F) do not apply to the decision of PBGC, the court would review PBGC's termination determination under the arbitrary and capricious standard); *PBGC v. Haberbush*, No. CV0002631GHKAIJX, 2000 WL 33362003, at *5-7 (C.D. Cal. Nov. 3, 2000) (granting summary judgment in favor of PBGC and terminating pension plan after reviewing PBGC's decision under the arbitrary and capricious standard); *PBGC v. FEL Corp.*, 798 F. Supp. 239, 241-42 (D.N.J. 1992) (granting PBGC's request to terminate a pension plan after reviewing PBGC's decision under the arbitrary and capricious standard). But in the end, the court is not persuaded that arbitrary and capricious review applies to review of action taken under 1342(c).

In the first case, *In re Pan Am.*, the court held that there was nothing in the applicable ERISA provisions to show that either § 706(2)(A) or § 706(2)(F) of the APA should not apply to the decision of PBGC. 777 F. Supp. at 1181. This conclusion ignored the import of the language in § 1342(c) requiring a judicial decree adjudicating that the plan must be terminated. By providing for a decree adjudicating that the plan must be terminated, Congress removed involuntary termination proceedings from the sphere of the APA and gave the court the discretion to determine that a plan must be terminated.

As the court in *PBGC v. Heppenstall Company* explained, "Congress determined that in the absence of agreement between PBGC and a plan administrator the court would protect participants from overly cautious use of the involuntary termination feature of the insurance scheme. 633 F.2d 293 at 301 (3d Cir. 1980). In *Heppenstall*, the Third Circuit rejected PBGC's argument that the court should defer to PBGC's administrative expertise in deciding a plan's termination date because the statutory scheme relegates resolution of disputes over termination to the court in the first instance. *Id.; see* 29 U.S.C. § 1348(b)(3) (stating that "if no agreement is reached [between PBGC and the plan administrator as to the date of termination of a plan], the date [is] established by the court"). Section 1342(c) likewise requires that the court adjudicate whether a plan must be terminated, which is Congress's delegation to the court of the responsibility of determining that a plan must be terminated.

Additionally, two of the courts relied on the Supreme Court's decision in *PBGC v. LTV Corp.*, 496 U.S. 633, 110 S. Ct. 2688, 110 L. Ed. 2d 579 (1990), in support of their decisions to apply the arbitrary and capricious standard of review. *See FEL,* 798 F. Supp. at 241; *Haberbush*, 2000 WL 33362003, at *6. But the Supreme Court in *LTV* was reviewing PBGC's decision restoring a terminated pension

plan pursuant to 29 U.S.C. § 1347, which is a statute that differs significantly from § 1342.[4] Section 1347 does not require a decree adjudicating that a plan must be restored or otherwise require the court to determine the appropriateness of PBGC's decision. The court recognizes that many decisions of PBGC are entitled to deferential review under the APA, as in *LTV Corp.*; however, this does not perforce mean that the court must defer to PBGC's decision to seek an involuntary termination pursuant to § 1342(c).

A. Facts Established in the Bankruptcy Court Proceedings

1. Sufficiency of Notice

In ruling on summary judgment, the bankruptcy court determined that if PBGC proved that the Pilot Plan must be terminated, it would be necessary to consider whether the notice provided by PBGC was sufficient to establish a termination date of December 30, 2004. Finding that there were no genuine issues of fact for trial, the bankruptcy court held that PBGC was entitled to an order establishing that its

---

[4] 29 U.S.C. § 1347 provides:

> Whenever the corporation determines that a plan which is to be terminated under section 1341 or 1342 of this title, or which is in the process of being terminated under section 1341 or 1342 of this title, should not be terminated under section 1341 or 1342 of this title as a result of such circumstances as the corporation determines to be relevant, the corporation is authorized to cease any activities undertaken to terminate the plan, and to take whatever action is necessary and within its power to restore the plan to its status prior to the determination that the plan was to be terminated under section 1341 or 1342 or this title. In the case of a plan which has been terminated under section 1341 or 1342 of this title the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to restore the plan to its pre-termination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.

notice of December 30, 2004 was effective. ALPA objects to this finding, arguing that PBGC was required to provide individualized notice to each of the approximately 15,000 participants of the Pilot Plan. The bankruptcy court was correct.

As stated previously, when PBGC and the plan administrator cannot agree on the termination date of a plan, the court must set one. 29 U.S.C. § 1348(a)(3), (4). To establish a termination date, the court considers (1) "the expectation of the plan participants," and (2) "the financial implications of the termination for PBGC." *See PBGC* v. *Republic Techs. Int'l, LLC*, 386 F.3d 659, 665 (6th Cir. 2004) (collecting cases). This analysis requires the court to "determine the earliest date when the plan participants had actual or constructive notice of the plan's termination, *i.e.*, notice sufficient to extinguish their reliance interests." *Id., citing In re Pension Plan for Employees of Broadway Maintenance Corp.*, 707 F.2d 647, 652-53 (2d Cir. 1983). After that date is determined, the court "should then select whatever later date serves the interest of PBGC." *Id., quoting Broadway Maintenance Corp.*, 707 F.2d at 652-53.

Courts have recognized various methods for PBGC to give actual or constructive notice to plan participants. *See Heppenstall*, 633 F.2d at 302 (acknowledging that constructive notice would suffice such as notice to the collective bargaining representative); *Republic Techs. Int'l, LLC*, 386 F.3d at 664, 668 (holding that publishing a notice in hometown newspapers and issuing a notice of termination the day before the date set as the termination date to the plan administrator and the union representative gave sufficient notice to the participants); *In re Pan Am.*, 777 F. Supp. at 1185 (holding that receipt of actual notice by plan participants satisfied PBGC's notice requirement).

PBGC sent its Notice of Determination to ALPA on December 29, 2004, and ALPA received this notice the following day, December 30, 2004. The Notice of Determination

also was published nationally in newspapers throughout the country on December 30, 2004. That same day, PBGC, United, and ALPA published press releases on their websites announcing PBGC's decision to seek termination of the Pilot Plan. These efforts by PBGC provided constructive notice to the plan participants that the plan would be terminated, effective December 30, 2004, such that the Pilot Plan's participants "no longer had a justifiable expectation in the accrual of vested pension rights." *Heppenstall*, 633 F.2d at 302.

The sufficiency of the collective, constructive notice provided by PBGC is consistent with the distinction between the notice requirements of 29 U.S.C. § 1342(c) and 29 U.S.C. § 1342(d)(2)(B). Congress mandated only that PBGC provide notice to the plan administrator before seeking a decree adjudicating that a pension plan must be terminated. *See* 29 U.S.C. § 1342(c). In contrast, if a trustee of a pension plan seeks termination of the plan, he must give notice to "each participant in the plan and each beneficiary of a deceased participant . . . ." 29 U.S.C. § 1342(d)(2)(B). While PBGC must give notice, Congress lessened the burden on PBGC as to each of the plan participants and beneficiaries. Had Congress intended that PBGC provide individualized notice to each of the participants and beneficiaries, Congress would have so provided.

ALPA argues, however, that the two-part test that the bankruptcy court applied was developed in wholly different circumstances in which a plan sponsor had ceased operations or was close to liquidation. While the economic circumstances faced by the employers and plan participants in *Heppenstall and Republic Technologies* were more dire than those confronted by the plan participants and beneficiaries in this case, the Notice of Termination sent by PBGC to United and ALPA, published in numerous newspapers, and discussed in the press releases of PBGC, United, and ALPA communicated effectively to the Pilot Plan's participants and

beneficiaries that PBGC was seeking to terminate the plan. The Pilot Plan's participants and beneficiaries had the ability to acquire the knowledge that PBGC was seeking to terminate the Pilot Plan by reasonably diligent inquiry. *See Eckstein v. Balcor Film Investors*, 58 F.3d 1162, 1168 (7th Cir. 1995) (noting that "constructive notice" means "no actual knowledge but the ability to acquire knowledge by reasonably diligent inquiry"). Moreover, ALPA's construction of the notice requirement is contrary to the language of §§ 1342(a)(4) and 1342(c), which allow PBGC to seek an involuntary termination, after giving notice to the plan administrator, based on the increase in PBGC's liability and not the condition of the employer.

ALPA argues further that its communications that it intended to challenge termination of the Pilot Plan and other developments, including a ratification vote on a modified agreement, raised such a strong expectation of plan continuation that PBGC's notice was ineffective. This argument was considered and rejected by the Sixth Circuit in *Republic Technologies*, which explained that "[e]very court to consider the issue has concluded that expectation interests in the accrual of benefits are extinguished on the date the participants receive reasonable notice from PBGC that the plan is going to be terminated." 386 F.3d at 667. The court sees no reason to depart from this standard in this case. The issue of notice does not focus on whether the plan participants agree with PBGC's decision to seek a termination or whether to contest the termination; it focuses on whether the plan participants had the knowledge or the ability to acquire the knowledge that PBGC was seeking to terminate the plan that was sufficient to extinguish their reliance interests. To find to the contrary would require courts to establish a sliding scale approach on the issue of notice, rendering the efficacy of PBGC's notice contingent upon how vigorously parties contest the involuntary termination proceeding, the financial conditions of the employer, and whether each participant had

knowledge of both the notice of termination and the efforts to contest the termination. Such an approach would necessarily delay the date of termination, thereby increasing PBGC's liability contrary to the purpose of § 1342(c).

Having determined that the constructive notice provided to the Pilot Plan's participants and beneficiaries was effective as of December 30, 2004, the court considers whatever later date serves the interest of PBGC. *See PBGC v. Mize Co., Inc.*, 987 F.2d 1059, 1063 (4th Cir. 1993) ("PBGC's interests should be deemed to be best served by the date proposed by PBGC."). Here, December 30, 2004 is the date the best serves PBGC's interests, as any later date would result in PBGC's incurring an increase in its liability.

2. Increase in PBGC's Liability

ALPA and URPA challenge the bankruptcy court's conclusion that PBGC met its burden under § 1342(c) to prove that the Pilot Plan should be terminated, effective December 30, 2004. Almost all of the evidence at trial focused on the extent of the loss that PBGC's fund would assume if the termination of the Pilot Plan did not occur until after December 30, 2004. Four actuarial witnesses testified. Documentary evidence consisted of excerpts from PBGC's administrative record and other internal documents, the agreements between United and ALPA modifying their collective bargaining agreements, and reports and other materials prepared by the parties' expert witnesses. The testimony of PBGC's witnesses evidenced that the total increase in PBGC's liability for the Pilot Plan from December 2004 through June 2005 would be $101 million: $44 million in increased liability if the plan terminated in January 2005 rather than December 2004 plus an additional $9.5 million per month in increased liability through June 2005. The testimony of ALPA's witness evidenced that the increase would be $79 million: $39 million in increased liability if the plan terminated after December 30, 2004 plus an additional monthly increase of $6.7 million.

The weight of the evidence at trial supported PBGC's calculation of the initial increased liability of PBGC, $44 million. In this calculation, PBGC documented an increase in maximum benefits guaranteed by PBGC that would result in increased liability for PBGC because many participants in the Pilot Plan were entitled to plan benefits that exceeded the amount guaranteed by PBGC. ALPA's expert did not explain his reason for his lower estimate. The weight of the evidence at trial supported ALPA's calculations as to the monthly increases in PBGC's liability through June 2005, $6.7 million, as the methodology of ALPA's expert reduced these monthly liability increases to present value, and PBGC had failed to document its correction of an initial, acknowledged error in calculating the effect of a non-terminated plan paying benefits in excess of guaranteed amounts. Thus, the evidence established that PBGC's total increase in liability through June 2005 would be $84.2 million.

3. The Pilot Plan Would Terminate

ALPA and URPA object to the bankruptcy court's finding that PBGC proved by a preponderance of the evidence that the Pilot Plan was likely to terminate. Although PBGC did not have a witness to testify as to whether the Pilot Plan would terminate or the financial condition of United, the bankruptcy court took judicial notice of matters of public record, which, taken together, support the reasonable inference that the Pilot Plan would terminate. The bankruptcy court considered, *inter alia*, that United had been in bankruptcy since December of 2002; United had announced that it needed to terminate all of its pension plans in order to successfully emerge from bankruptcy; United had initiated a 1113 proceeding to remove from its collective bargaining agreements provisions requiring contributions to the pension plans; and United's business plan in August of 2004 did not provide for any pension contributions.

ALPA and URPA argue, however, that the bankruptcy court relied on documents that it had previously held inadmissible and hearsay statements that PBGC never attempted to introduce into evidence. ALPA and URPA argue further that had the bankruptcy court made proper findings of fact, it would have been obliged to take into account the fact that the only evidence introduced at trial regarding the likelihood of plan termination was the Kramer Report, which ALPA and URPA assert demonstrated that the Pilot Plan did not need to be terminated. It was proper, however, for the bankruptcy court to take judicial notice of matters of public record. *See Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) (stating that "[j]udicial notice of historical documents, documents contained in the public record, and reports of administrative bodies is proper"). And the Kramer Report offered the opinion that not all four of United's pension plans needed to be terminated, but it did not establish that United would choose to save the Pilot Plan if it had to choose between the plans.

ALPA and URPA also argue that the bankruptcy court should not have relied on United's agreement with ALPA to support the termination or United's statements that it would have to terminate its pension plans in order to emerge from bankruptcy. As recognized by the bankruptcy court, however, the ALPA agreement demonstrated United's position that the plan needed to be terminated in order for United to emerge from bankruptcy. United's statements that it would have to terminate its pension plans in order to emerge from bankruptcy, while not admissible for their truth, are admissible as evidence of United's bankruptcy plan and its intent. United intended to terminate its pension plan in order to emerge from bankruptcy. United's intent, coupled with numerous matters of public record, allowed the bankruptcy court to draw the reasonable inference that the Pilot Plan would terminate. Importantly, when asked by the bankruptcy judge, neither ALPA nor URPA offered any evidence contradicting the

inference that the Pilot Plan would terminate[5] Thus, although the evidence that the Pilot Plan would terminate was somewhat sparse, it was credible and uncontradicted. As such, the bankruptcy court correctly determined based on a preponderance of the evidence that the that the Pilot Plan would terminate.

3. Unreasonable Increase in PBGC Liability

Having determined that the Pilot Plan would terminate, the bankruptcy court considered whether the increase in liability of PBGC, whether $79 million or $101 million or some amount in between, would be "unreasonable," as required for termination under § 1342(c). Section 1342(c) specifies that the court will issue a decree adjudicating that a plan must be terminated to avoid any unreasonable increase in the liability of the fund. 29 U.S.C. § 1342(c). The statute, however, does not define "unreasonable." There is also little guidance in the way of case law or legislative history. *See In re Pan Am.*, 777 F. Supp. at 1182 (discussing former version of § 1342(c) which utilized "further increase" rather than "unreasonable increase" language). Lacking guidance by the statute, the bankruptcy court fashioned a standard that requires both a monetarily significant increase in PBGC's liability and a plan likely to terminate in an underfunded condition, such that the increase in liability would be reflected in an actual additional loss for PBGC's insurance fund. ALPA and URPA object to the bankruptcy court's "unreasonable increase" standard, arguing that an "unreasonable increase" must be determined based on something more than increases that resulted from the ordinary operation of a plan and that considered the overall amount of the increase in the context of the plan's

[5] URPA offered the testimony of an actuarial witness as to a "split-freeze plan" as evidence that the termination of the Pilot Plan was not necessary. The witness acknowledged, however, that United was unwilling to pursue this plan. As a result, while this alternative plan was theoretically possible, it was not likely to transpire.

total assets. The court sustains in part and overrules ALPA and URPA's objections.

First, the statute specifies *"any* unreasonable increase." This word choice demonstrates that the focus of the court's consideration is to be the increase itself and whether that amount is unreasonable rather than on ALPA's view that the cause of the increase matters. Accordingly, that the initial increase in PBGC's liability in this case would result from a statutory annual adjustment has no bearing on whether that increase in PBGC's liability is unreasonable.

Second, when considered in the context of the statute, an "unreasonable increase" in PBGC's liability constitutes a monetarily significant amount. Title IV endows PBGC with the responsibility of furthering the statutory purposes of Title IV identified by Congress. *LTV Corp.,* 496 U.S. at 649. These purposes are

> (1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,
>
> (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and
>
> (3) to maintain premiums established by [PBGC] under section 1306 of this title at the lowest level consistent with carrying out the obligations under this subchapter."

Id., quoting 29 U.S.C. § 1302(a). These purposes do not always coexist peaceably. At times, such as in the present matter, PBGC must forego encouraging the continuation and maintenance of a particular plan in order to ensure that an increase in PBGC's liability does not affect negatively the payment of benefits to all participants and beneficiaries or the premiums established by PBGC. Additionally, PBGC must confront a $23 billion deficit[6] and, therefore, must be vigilant

---

[6] The PBGC's deficit is a matter of public record. *See* PBGC's 2005 Performance Accountability Report at p.4, http://www.pbgc.gov/workers-

in limiting its losses while continuing to protect its statutorily-defined responsibilities. *See In re UAL Corp.*, 428 F.3d 677 at 681 (7th Cir. 2005) (stating that "[t]hrough 29 U.S.C. § 1342, Congress authorized PBGC to terminate a failing plan so that PBGC could nip a plan's increasing losses and thereby reduce PBGC's exposure to mounting liabilities."). A monetarily significant amount is the best gauge as to the effect PBGC's increased liability would have on its statutory responsibilities.[7]

Third, the court is guided by the reasoning of the court in *Heppenstall* in the balancing of competing interests involved in an involuntary termination. In *Heppenstall*, the court was tasked with determining the termination date of a plan pursuant to § 1348(b)(2), and to resolve this issue, the court weighed the competing interests involved, the same interests at issue here: PBGC's interest as an insurer in promptly terminating an underfunded plan in order to avoid additional losses to its insurance fund and the plan participants' interest in receiving expected benefits. 633 F.2d at 301-02.

Here, PBGC's interest is furthered when a plan is terminated because its continued operation would result in a depletion of PBGC's insurance fund, while the participants' interest is furthered by not terminating a plan that would not

---

retirees/about-pbgc/content/page13176.html. The court make take judicial notice of matters of public record. *See Menominee Indian Tribe of Wisconsin*, 161 F.3d at 456.

[7] The court in the *Pan Am* case similarly stated, "A substantial increase in . . . [PBGC's] potential liability, with no certain prospect that such potential liability can be recouped, should be regarded under this statute as unreasonable because the PBGC fund must be available to protect the minimally guaranteed benefits of all covered plans in the United States, not just the benefits of Pan Am employees." *In re Pan Am.*, 777 F. Supp. at 1183. That court, however, relied on the arbitrary and capricious standard in finding that an additional liability of $700,000 per month was unreasonable. As such, it does not provide much assistance to the court under the *de novo* standard.

result in such a depletion. In this regard, the court departs from the bankruptcy court's construction of the appropriate standard. This court's construction of § 1342(c) is consistent with its express language, which provides that the court will issue a decree adjudicating that a "plan *must* be terminated to avoid . . . *any unreasonable increase* in the liability of the fund." It is not the potential increase in the liability of PBGC that Congress sought to avoid by granting PBGC the authority to initiate involuntary termination proceedings. Rather, it is any actual, unreasonable increase in the liability of the fund, and this is best measured by a monetarily significant amount. Thus, the court sustains the objection of URPA that the bankruptcy court impermissibly lowered the standard for determining whether a plan must be terminated by ruling that PBGC was required to show that the Pilot Plan was *likely* to terminate in an underfunded condition. Because the evidence presented to the bankruptcy court established that the Pilot Plan would terminate, this alteration of the standard does not affect the outcome of this involuntary termination proceeding.

The ultimate question is whether $84.2 million is monetarily significant. There is no bright line standard to apply, as "significant" is, of course, a relative term. It requires a context. Considered in absolute terms, $84.2 million is a large amount of money. Yet, if $84.2 million is considered in the context of PBGC's overall liability for the Pilot Plan, $84.2 million is not particularly significant, as the record shows that the potential increase in PBGC's liability is less than three percent of the Pilot Plan's total assets. At the same time, liability increases of much smaller amounts have been seen as grounds for termination. *See Heppenstall*, 633 F.2d at 300 (noting termination based on an increase in liability of $3-4 million). In the context of PBGC's deficit of $23 billion, an additional $84.2 million is a significant burden and a significant additional loss for PBGC's insurance fund, particularly since PBGC can avoid that additional liability with a December 30, 2004 termination date. In that regard, the

significance of the $84.2 million is measured in the context of PBGC's economic position, the dollar amount of PBGC's increased liability, and the ability of PBGC to avoid that liability. Evaluating the significance of the $84.2 million in this context best accommodates PBGC's competing responsibilities to its fund, its beneficiaries, and employers who pay premiums, as it is PBGC's liability that is the focus of the inquiry and not a particular plan. In this context, the $84.2 million is monetarily significant.

As set forth above, PBGC satisfied its burden at trial of establishing by a preponderance of the evidence that the Pilot Plan must be terminated. First, the evidence showed that the increase in PBGC's liability was a monetarily significant amount, as PBGC's total increase in liability through June 2005 would be $84.2 million. Second, the uncontroverted evidence at trial demonstrated that the Pilot Plan would not continue. As a consequence, the termination of the Pilot Plan is necessary to avoid an unreasonable increase in PBGC's liability. Thus, the court will issue a decree of termination and the termination date of the plans will be December 30, 2004.

ORDER

For the reasons stated above, the court accepts the bankruptcy court's proposed findings of fact and conclusions of law as modified. The court concludes that the termination of the Pilot Plan is necessary to avoid an unreasonable increase in PBGC's liability. A decree of termination will issue and the termination date is fixed at December 30, 2004.

Enter: /s/ Joan Humphrey Lefkow
JOAN HUMPHREY LEFKOW
United States District Judge

Date: June 13, 2006

APPENDIX D

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed FEB 13, 2006]

Chapter 11
Case No. 02-B 48191
Adversary No. 05-AP 00481

In re: UAL CORPORATION, *et al.*,
Debtors.

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff,

v.

UNITED AIR LINES, INC., as Plan Administrator for the United Airlines Pilot Defined Benefit Pension Plan,
Defendant,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, UNITED RETIRED PILOTS BENEFIT PROTECTION ASSOCIATION, ROGER D. HALL, DENNIS D. DILLON, GERARD TERSTIEGE, EUGENE M. CUMMINGS, RAYMOND P. FINK, JAMES M. KRASNO and WILLIAM L. RUTHERFORD,
Intervenors.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON MOTION FOR SUMMARY JUDGMENT AND FOLLOWING TRIAL

On October 26, 2005, the court issued an Amended Memorandum of Decision on Motion for Summary Judgment [Docket No. 147] and a Memorandum of Decision [Docket

No. 148] in the above-entitled adversary proceeding. On February 2, 2006, the district court issued its Memorandum Opinion and Order in which it determined that the court did not have core jurisdiction over this adversary proceeding and thus, the court is limited, in the absence of consent from the parties, to making recommendations to the district court, which alone may enter a final order resolving the proceeding, 28 U.S.C. § 157(c)(1). Accordingly, the court adopts as its recommendation to the district court the two previously issued memoranda, with the exception of those portions of the memoranda that address the court's jurisdiction. Copies of the memoranda are attached hereto as Exhibits A and B.

Dated: February 13, 2006

/s/ Eugene R. Wedoff
EUGENE R. WEDOFF
United States Bankruptcy Judge

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Chapter 11
Case No. 02-B 48191
Adversary No. 05-AP 00481

In re: UAL CORPORATION, *et al.*,
Debtors.

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff,

v.

UNITED AIR LINES, INC., as Plan Administrator for the United Airlines Pilot Defined Benefit Pension Plan,
Defendant,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, UNITED RETIRED PILOTS BENEFIT PROTECTION ASSOCIATION, ROGER D. HALL, DENNIS D. DILLON, GERARD TERSTIEGE, EUGENE M. CUMMINGS, RAYMOND P. FINK, JAMES M. KRASNO and WILLIAM L. RUTHERFORD,
Intervenors.

AMENDED MEMORANDUM OF DECISION
ON MOTION FOR SUMMARY JUDGMENT

This adversary proceeding, arising in the administratively consolidated Chapter 11 cases of United Air Lines, Inc. ("United") and its related entities, is before the court for ruling on the motion of the Pension Benefit Guaranty Corporation ("PBGC") for summary judgment. The motion seeks an order (1) terminating the United Airlines Pilot Defined

Benefit Pension Plan (the "Pilot Plan") and appointing PBGC as trustee of its assets; (2) establishing December 30, 2004, as the termination date of the Pilot Plan under 29 U.S.C. § 1348(a)(4); and (3) requiring United and all other persons who have possession, custody or control of all records, assets and property of the Pilot Plan to deliver them to PBGC. The third request is not in dispute: the parties acknowledge that if the Pilot Plan is terminated, the records, assets and property of the Pilot Plan must be turned over to PBGC as trustee. There is a dispute, however, regarding plan termination and the termination date.

As discussed below, PBCC is not entitled to summary judgment because there is a dispute with respect to plan termination. In the absence of an agreement with the plan administrator, PBCC must prove at trial, by a preponderance of the evidence, that the Pilot Plan must be terminated "in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or to avoid any unreasonable increase in the liability of the fund." 11 U.S.C. § 1342(c). However, if PBGC satisfies this burden of proof and the Pilot Plan is terminated, the December 30 termination date suggested by PBGC will be effective, because the undisputed facts demonstrate that participants of the Pilot Plan received adequate notice of termination on that date and that date serves the interests of PBGC.

Jurisdiction

Federal district courts have exclusive jurisdiction over bankruptcy cases. 28 U.S.C. § 1334(a). Pursuant to 28 U.S.C. § 157(a), district courts may refer bankruptcy cases to the bankruptcy judges for their district, and by internal Operating Procedure 15(a) the District Court for the Northern District of Illinois has made such a reference of the pending cases. When presiding over a referred case, the bankruptcy court has jurisdiction under 28 U.S.C. § 157(b)(1) to enter appropriate orders and judgments in core proceedings within the case.

PBGC's adversary is a core proceeding under 28 U.S.C. § 157(b)(2)(A) (matters concerning estate administration). This court may therefore enter a final judgment. *In re Smith*, 848 F.2d 813, 816 (7th Cir. 1988).

Factual Background

The background facts relevant to the pending motion are not in dispute.[1]

On December 9, 2002, United and twenty-seven related corporations filed the voluntary Chapter 11 cases now before the court. (JPS at 22.) United is the plan administrator and contributing sponsor of the Pilot Plan under ERISA. (*Id.* at 21.) Approximately 15,000 active, retired and terminated United employees are participants in the Pilot Plan. (*Id.* at 22.) Before the end of 2004, United stated repeatedly, in court filings and in communications to the press and it's employees, that it would likely need to terminate and replace all of its defined benefit pension plans in order to emerge successfully from bankruptcy. (*See Id.* at 22.)

---

[1] Citations are to the Joint Pretrial Statement filed on March 16, 2005 [Docket No. 30] ("JPS"); PBGC's Motion for Summary judgment and attachments filed on June 6, 2005 [Docket No. 54], including the Statement of Undisputed Material Facts in Support of PBGC's Motion for Summary judgment ("PBGC's Statement of Undisputed Material Facts") and the the Declaration of Andrea Wong and attached exhibits ("Wong Decl."); United's Response to PBGC's Statement of Undisputed Material Facts in Support of PBGC's Motion for Summary judgment and Statement of Additional Facts filed on July 15, 2005 [Docket No. 74] ("United's Response to PBGC's Undisputed Facts"); Response of ALPA to PBGC's Statement of Undisputed Material Facts filed on July 22, 2005 [Docket No. 91] ("ALPA's Response to PBGC's Undisputed Facts"); United Retired Pilots Benefit Protection Association and Certain Individual Retired Pilots' Response to Statement of Undisputed Material, Facts in Support of PBGC's Motion for Summary Judgment filed on July 15, 2005 [Docket No, 83] ("Retired Pilots' Response to PBGC's Undisputed Facts"); and PBGC's eight volume administrative record filed on March 28, 2005—volumes 1-3 [Docket No. 47] ("AR") and volumes 4-8 filed under seal [Docket No. 34] ("AR-S").

The Air Line Pilots Association, International ("ALPA") is the exclusive collective bargaining representative of United's pilots. ALPA entered into collective bargaining agreements with United that establish the terms and conditions of employment for United's pilots, including pension benefits provided under the Pilot Plan. (JPS at 21-22.) The United Retired Pilots Benefit Protection Association ("Retired Pilots") is an Illinois not-for-profit corporation created to protect the benefits of United's retired pilots. (*Id.* at 22.)

PBGC is a United States government corporation established under 29 U.S.C. § 1302(a) to administer the insurance program for defined benefit pension plans created under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1301-1461. (JPS at 21.) PBGG guarantees certain benefits under pension plans covered by ERISA and has authority, under circumstances defined by ERISA, to terminate underfunded pension plans. (*Id.* at 23-24; *see* 29 U.S.C. § 1342.) PBGC has established an administrative process, involving its Trustee Working Group ("TWG"), to determine whether and when a pension plan should be terminated. (*See* Wong Decl., Ex. 1 (PBGC Directive issued on May 8, 2001).)[2]

On December 17, 2004, United filed a motion seeking approval of a tentative agreement with ALPA providing for substantial modifications to their collective bargaining agreement. In the agreement, ALPA promised not to oppose termination of the Pilot Plan by United, and United promised

---

[2] TWG is an interdisciplinary body, comprised of representatives from PBGG's financial, actuarial, policy and legal offices, that makes recommendations for plan termination timed on staff reports. (Wong Decl., Ex. 1 at § 3.) In cases involving claims of $100 million or more, the Executive Director of PBGC determines whether to proceed with a termination recommended by TWG. (*Id.* at § 21)(4), 3.) The Executive Director also determines the termination date that should be proposed to the plan administrator. (*Id.*)

not to seek plan termination, and to oppose any attempt by PBGC to terminate the plan, before May 2005.[3]

On December 23, 2004, PBGG staff forwarded a memorandum to the chairman of the TWG recommending termination of the Pilot Plan with a termination date as soon as practicable but in no event later than December 30, 2004. (PBGG's Statement of Undisputed Material Facts at ¶ 15; AR at 14-23.) On December 27, 2004, the TWG met and voted to concur with this recommendation. (*Id.* at ¶ 16; AR at 11-13.) On December 27, 2004, TWG's recommendation, with supporting materials, was transmitted to PBGC's Executive Director. (*Id.* at ¶ 17; AR at 7.) On December 29, 2004, the Exeeutive Director issued a Notice of Determination, which provided as follows:

> [T]he Pension Benefit Guaranty Corporation ("PBGC") has determined, under section 4042(a)(4) of the Employee Retirement Income Security Act of 1974, as *amended* ("ERISA"), 29 U.S.C. § 1342(a)(4), that the United Airlines Pilot Defined Benefit Pension Plan ("Plan") must be terminated because the possible long-run loss of the corporation with respect to the Plan may reasonably be expected to increase unreasonably if the

---

[3] *See* United's Motion to Approve Letter of Agreement Modifying Their Collective Bargaining Agreement with ALPA filed on December 17, 2004 [Docket No. 9365]. United's motion to approve the December Letter of Agreement was denied, but a revised agreement was approved on January 31, 2005. *See* Order Denying Motion to Approve entered on January 7, 2005 [Docket No. 9697]; United's Motion to Approve Agreements Modifying Collective Bargaining Agreements filed on January 19, 2005 [Docket No. 9772]; Order Granting Motion to Approve entered on January 31, 2005 [Docket No. 9933]. The revised agreement continued to provide for ALPA's waiver of opposition to termination after May 11, 2005. In the revised agreement, United promised not to seek plan termination and to oppose PBGC initiated termination at any time before the earlier of ten days before exiting bankruptcy or termination of United's other defined benefit pension plans.

> Plan is not terminated. PBGC further determined, under ERISA § 4042(c), 29 U.S.C. § 1342(c), that the Plan must be terminated in order to avoid any unreasonable increase in the liability of the fund. Accordingly, PBGC intends to proceed under ERISA § 4042, 29 U.S.C. § 1342, to have the Plan terminated and PBGC appointed as statutory trustee, and under ERISA § 4048, 29 U.S.C. § 1348, to have December 30, 2004, established as the Plan's termination date.

(*Id.* at ¶33; AR at 1.)[4]

On December 29, 2004, PBGG sent to United and ALPA via overnight mail a copy of the Notice of Determination, which ALPA received on December 30, 2004. (PBGC's Statement of Undisputed Material Facts at ¶ 34-37; Wong Decl., Ex. 2.)[5] On December 30, 2004, the Notice of Determination was published nationally in *USA Today* and a

---

[4] PBGC has determined that if the Pilot Plan continued until June 2005, it would have to absorb as much as $138 million of additional liability, (PBGC's Statement of Undisputed Material Facts at ¶ 20.) United, ALPA and the Retired Pilots dispute PBGC's determination regarding its possible long-run loss in relation to the Pilot Plan. (United's Response to PBGC's Undisputed Facts at ¶ 20; ALPA's Response to PBGC's Undisputed Facts at ¶ 20; Retired Pilots' Response to PBGC's Undisputed Facts at 1120.)

[5] United has objected to the facts asserted by PBGC regarding notice, but only on the ground that these facts are not included in the administrative record. (United's Response to PBGC's Undisputed Facts at ¶¶ 34-37.) Because, as discussed below, PBGC is required to prove its case—and not merely to defend against claims that its decision-making was arbitrary--PBGC is not limited to facts set out in its administrative record. ALPA and the Retired Pilots admit these facts, but object on the ground that PBGC's arguments regarding notice exceed the "limited scope of the summary judgment motion this Court permitted PBGC to file before the close of discovery." (ALPA's Response to PBGC's Undisputed Facts at ¶¶ 34-37; Retired Pilots' Response to PBGC's Undisputed Facts at ¶¶ 34-37.) Both objections are addressed in the Conclusions of Law. *See infra*, n. 7.

variety of major newspapers serving metropolitan areas where United's hubs are located, including *The Chicago Tribune, The Washington Post, The Los Angeles Times, The San Francisco Chronicle, The Denver Post*, and *The Rocky Mountain News*. (PBGC's Statement of Undisputed Material Facts at ¶ 38; Wong Decl., Ex. 3.) In addition, on December 30, 2004, PBGC, United and ALPA all published press releases on their websites announcing PBGC's decision to seek termination of the Pilot Plan. (PBGC's Statement of Undisputed Material Facts at ¶ 38; Wong Decl., Exs. 4, 5, 6.)[6]

On December 30, 2004, PBGC filed a complaint in the United States District Court for the Northern District of Illinois seeking termination of the Pilot Plan. (*See* Complaint (Case No. 04-cv-0838 [Docket No, 1]) at ¶ 1.) The district court granted motions by ALPA and the Retired Pilots to intervene under Fed. R. Civ. P. 24 and also granted United's emergency motion to confirm automatic referral to the bankruptcy court pursuant to Internal Operating Procedure 15(a). (Case No. 04-cv-08338 [Docket Nos. 9, 12, 22, 23].) The case was transferred to this court on February 1, 2005, creating the pending adversary. (*Id.* [Docket No. 27].) On March 28, 2005, PBGC filed the administrative record supporting its decision to seek involuntary termination of the Pilot Plan. (AR; AR-S.)

---

[6] ALPA indicates that it "lacks knowledge sufficient to either admit or deny the allegations of paragraph 38." (ALPA's Response to PBGC's Undisputed Facts at ¶ 38.) Because ALPA's response does not controvert the facts set forth in paragraph 38, the facts are deemed admitted pursuant to Local Rule 7056-2B. The Retired Pilots deny paragraph 38 as not being supported by reference to the record because Exhibit 4 to the Wong declaration does not contain the mentioned publications and Exhibit 5 does not contain a PBGC press release. (Retired Pilots' Response to PBGC's Undisputed Facts at ¶ 38.) However, Exhibits 3 and 4 to the Wong declaration do contain the newspaper publications as well as PBGC's press release, and the apparent error in PBGC's Statement of Undisputed Material Facts does not undermine the facts asserted.

On May 11, 2005, this court approved a settlement between United and PBGC that provided for an agreed termination of the Pilot Plan "with a termination date that is either mutually agreed by [United and PBGC] or judicially determined," but nothing in the settlement limited PBGC's right to seek its proposed plan termination date of December 30, 2004, nor did the settlement require United to act in a manner inconsistent with the revised agreement with ALPA, under which it was obligated to oppose a termination date before that of United's other defined benefit pension plans. (Order Granting United's Motion to Approve Agreement with PBGC entered on May 11, 2005 [Docket No. 11229], Ex. A, ¶ 4.)

Conclusions of Law

A. Summary Judgment Standards

A motion for summary judgment may be granted if the movant demonstrates through admissible evidence that no genuine issue of material fact exists for trial and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c), incorporated by reference in Fed. R. Bankr. Proc. 7056(c).[7] The initial—and dispositive—issue raised by the present summary judgment motion is whether under 29 U.S.C. § 1342(c) a court may issue a decree terminating a pension

---

[7] The Retired Pilots argue that insofar as PBGC's motion seeks to establish a termination date it requests relief beyond the scope of the motion that the court directed PBGC to submit. ALPA poses a similar objection. (*See* ALPA's Response to PBGC's Undisputed Facts at 2.) Under Fed. R. Civ. P. 56, "[a] party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor *upon all or any part thereof*." *Id.* (emphasis supplied). PBGC's motion for summary judgment is appropriate because it seeks relief contained in its Complaint. (See Complaint at ¶ 1.)

plan if parties opposing termination fail to establish that PRGC acted arbitrarily in seeking termination, or whether PBGC must affirmatively establish grounds for termination if PBGC must prove its case, summary judgment could not be granted, because the grounds for plan termination here are in dispute.

As discussed below, summary judgement must be denied because § 1342(c) requires a judicial determination that the Pilot Plan must be terminated—a question on which PBGC bears the burden of proof—not simply judicial review of the reasonableness of PBGC's decision to seek termination. On the other hand, there is no factual dispute regarding notice to plan participants. PBGC gave effective notice of plan termination on December 30, 2004, and is entitled to an order making that finding. If, at trial, PBGC establishes grounds for termination as of December 30, 2004, the plan will be terminated as of that date.

B. The Standard of Review under 29 U.S.C. § 1342(c)

Title IV of ERISA provides the exclusive means for terminating a defined benefit pension plan regulated by the statute. 29 U.S.C. § 1341(a)(1). Section 1342(a) gives PBGC the authority to institute proceedings to terminate a plan if PBGC determines that any of four listed grounds exist. 29 U.S.C. § 1342(a)(1)-(4). One of the grounds in § 1342(a)—the one on which PBGC relies here—is that "the possible long-run loss of [PBGC] with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated." 29 U.S.C. § 1342(a)(4).

Under § 1342(c), if PBGC and the plan administrator agree that a plan should be terminated and a trustee appointed, then termination may occur without court adjudication.[8] When

---

[8] Section 1342(c) provides in pertinent part as follows:

> If the corporation [PBGC] is required under subsection (a) of this section to commence proceedings under this section with respect to a

there is such an agreement, termination occurs by way of PBGC's informal agency action, which, if challenged, is subject to judicial review under the arbitrary and capricious standard of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.[9]

> plan or, after issuing a notice under this section to a plan administrator, has determined that the plan should be terminated, it may, upon notice to the plan administrator, apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund . . . Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under subsection (b) of this section (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan in accordance with the provisions of this subtitle. If the corporation and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee without proceeding in accordance with the requirements of this subsection (other than this sentence) the trustee shall have the power described in subsection (d)(1) of this section and, in addition to any other duties imposed on the trustee under law or by agreement between the corporation and the plan administrator, the trustee is subject to the duties described in subsection (d)(3) of this section . . .

29 U.S.C. § 1342(c); *see Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197, 199 (2d Cir. 1987) ("On its face [the fourth sentence of subsection 1342(c)] permits PBGC and the administrator . . . to proceed in a summary fashion without affording plan members pretermination notice and hearings to contest the propriety of the termination decision.") Additionally, §1342(b)(3) authorizes PBGC and the plan administrator to agree upon appointment of PBGC as trustee without instituting a court proceeding. ("[PBGC] and plan administrator may agree to the appointment of a trustee without proceeding in accordance with the requirements of paragraphs (1) and (2).") Otherwise, PBGC may apply to the court for the appointment of a trustee pending a decree terminating the plan pursuant to § 1342(c). 29 U.S.C. § 1342(b)(1).

[9] "Informal" action is a residual category including all agency actions that are not rulemaking and that need not be conducted through "on the

However, and of critical importance here, if the plan administrator does not to agree to termination of the plan, PBGC must, as it did in this case, "apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated." 29 U.S.C. § 1342(c). In this context, § 1342(c) requires a *de novo* determination of the appropriateness of plan termination, not mere deferential review under the APA of PBGC's determination to proceed.

- First, § 1342(a) provides that with respect to "small plans" PBGC may prescribe a simplified procedure for termination "as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c) of this section)." 29 U.S.C. § 1342(a). Thus, the statute itself requires that the court decree serve as a "substantial safeguard" for the rights of parties other than PBGC affected by plan termination; deferential review of agency decision-making is inconsistent with this requirement.

- Second, the grounds for termination required to support a judicial decree under § 1342(c) are significantly different from those that PBGC must find to initiate termination proceedings under § 1342(a).[10] PBGC may decide to initiate

---

record" hearings. *See City of West Chicago v. NRC*, 701 F.2d 632, 644 (7th Cir. 1983). Section 706 of the APA instructs the court to set aside "agency action" in all cases if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" or if the action fails to meet statutory, procedural or constitutional requirements. 5 U.S.C. § 706. When termination occurs through informal action, the court accordingly reviews PBGC's decision under the arbitrary and capricious standard. *See PBGC v. LTV*, 496 U.S. 633, 655 (1990) (reviewing PBGC's informal action restoring a terminated pension plan pursuant to 29 U.S.C. § 1347).

[10] Section 1342(a) provides in pertinent part that PBGC may institute proceedings to terminate a plan whenever it determines that:

termination proceedings under § 1342(a) without addressing the grounds needed for a judicial decree effecting a termination under § 1342(c). For example, under § 1342(a)(1), PBGC may initiate termination proceedings simply because a plan is underfunded, but if the underfunding is only temporary, it would not necessarily establish any of the grounds for termination under § 1342(c).[11] Thus, a judicial decree under § 1342(c) must be based on more than a determination that PBGC did not act arbitrarily in initiating the proceeding.

- Finally, § 1342(c) states that the court decree itself is to "adjudicate" whether termination is necessary under one of the specified grounds, not merely to review a determination

---

(1) the plan has not met the minimum funding standard required under section 412 of Title 26, or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of Title 26 has been mailed with respect to the tax imposed under section 4971(a) of Title 26,

(2) the plan will be unable to pay benefits when due,

(3) the reportable event described in section 1343(c)(7) of this title has occurred, or

(4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

29 U.S.C. § 1342(a). Section 1342(c), by contrast, requires a judicial decree of termination to be based on a need "[1] to protect the interests of the participants, [2] to avoid any unreasonable deterioration of the financial condition of the plan or [3] to avoid any unreasonable increase in the liability of the fund."

[11] The statutory structure appears to address precisely this situation. if the determination administrator believes that an underfunded plan cannot survive, and so accepts a PBGC determination under § 1342(a) that the plan should be terminated, termination becomes effective without judicial involvement. But if the administrator believes that an underfunded plan is still viable and declines to accept PBGC's decision to terminate, the employer is entitled to a judicial proceeding at which PBGC must establish the necessity for termination under § 1342(c).

previously made by PBGC. *See Black's Law Dictionary* (8th ed. West 2004) ("adjudicate" means lo rule upon judicially").

The legislative history of ERISA confirms that *de novo* judicial determination was an intentional feature of the law. Under the original version of the House bill, unless the plan administrator requested termination, the Secretary of Labor was authorized to terminate a plan only after an administrative hearing establishing grounds for termination. See H.R. Conf. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5151. The bill was ultimately referred to a conference committee that removed the requirement for an administrative hearing but introduced the current requirement for court adjudication. *Id.* at 5152. Thus, a formal hearing on plan termination was always required if the administrator did not consent; the court was simply given the role of adjudicator originally assigned to the agency.

PBGC's argument for deferential judicial review here resembles the argument it made in *PBGC Heppenstall Co.*, 633 F.2d 293 (3d Cir. 1980). In *Heppenstall*, PBGG insisted that the court should defer to PBGC in determining a plan's termination date under § 1348.[12] The court rejected that deferential approach on the ground that the statutory scheme relegates resolution of disputes over termination to the courts in the first instance, not to PBGC." *Id.* at 301. Concerned. about PBGC's obvious interest in protecting the solvency of the pension insurance program, the court said: "Congress determined that in the absence of agreement between PBGC and a plan administrator the court would protect participants from overly cautious use of the involuntary termination feature of the insurance scheme." *Id.* The analysis in *Heppenstall* is fully applicable here.

---

[12] Section 1348 provides that in the absence of an agreement between the plan administrator and PBGC, the termination date of a plan is "the date established by the court." 29 U.S.C. §1384(a)(4). At the time the Heppenstall opinion was issued, this language was found at § 1384(2).

PBGC's cites three decision to support deferential review of its termination decision, but none is persuasive.

The first, *In re Pan American World Airways, Inc. Cooperative Ret. Inc. Plan*, 777 F. Supp. 1179, 1181. (S.D.N.Y. 1991), held that de novo judicial determination was unwarrantcd because "[t]here is nothing in the applicable ERISA provisions to show that the [judicial review provisions] of the Administrative Procedures Act . . . should not apply to this decision by PBGC." 777 F. Supp. at 1181. The court reasoned that [t]o find a contrary intent in the statute would be to depart from the usually applicable deference to the expertise of an administrative agency, particularly when the agency has made an adjudicative decision within its sphere of responsibility." *Id.* at 1181-82.[13] As discussed above, however, § 1342(c) removes contested plan termination from PBGC's sphere of responsibility. In the absence of consent from the plan administrator, PBGC is required to obtain a judicial decree; it cannot engage in informal agency action subject merely to deferential judicial review.

In *PBGC v. FEI Corp.*, 798 F. Supp. 239, 241 (D. N.J. 1992), the court applied the APA's arbitrary and capricious standard rather than holding a *de novo* hearing, based principally on the Supreme Court's decision in *LTV*, 496 U.S. 633. But *LTV* involved PBGC's decision to restore a terminated pension plan under 29 U.S.C. § 1347, a statute significantly different from § 1342.[14] Unlike § 1342, § 1347

---

[13] Under the APA, "[t]he reviewing court is not empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

[14] Section 1347 provides as follows:

> Whenever the corporation [PBGC] determines that a plan which is to be terminated under section 1341 or 1342 of this title, or which is in the process of being terminated under section 1341 or 1342 of this title, should not be terminated under section 1341 or 1342 of

does not require PBGC, to apply to the court for a decree adjudicating that a plan must be restored when the plan administrator disagrees with PBGC's decision. Although enforcement of PBGC's decision to restore a pension plan pursuant to § 1347 may require the assistance of a court, the restoration is accomplished, with or without the agreement of the plan administrator, solely on account of PBGC's informal agency action. Thus, *LTV*'s application of the arbitrary and capricious standard to PBGC decision-making under § 1347 has no bearing on court adjudications under § 1342.

The third decision, *PBGC v. Haberbush*, No. CV0002631GHKAIJX, 2000 WL 33362003 (C.D. Cal. Nov. 3, 2000), applied the APA's arbitrary and capricious standard because PBGC's determination to terminate a pension plan pursuant to § 1342 was "final agency action." *Id.* at *5. The *Haberbush* court also relied on LTV, reasoning that "the Supreme Court has held that the APA's arbitrary and capricious standard of review applies to a determination of the PBGC governed by the same set of statutory provisions at issue in this case." *Id.* at 46. However, PBGC's decision under § 1342(a) is only final agency action when the plan

---

this title as a result of such circumstances as the corporation determines to be relevant, the corporation is authorized to cease any activities undertaken to terminate the plan, and to take whatever action is necessary and within its power to restore the plan to its status prior to the determination that the plan was to be terminated under section 1341 or 1342 of this title. In the case of a plan which has been terminated under section 1341 or 1342 of this title the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to restore the plan to its pretermination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.

29 U.S.C. § 1347.

administrator waives § 1342's requirement for a court decree, and, as noted above, LTV is not relevant here.

Because the court must determine whether grounds for termination under § 1342(c) exist, and because there are factual disputes over whether termination of the Pilot Plan is appropriate under those standards, *see supra*, n. 4, a trial on that question is necessary. As any plaintiff in typical civil litigation, PBGC will have the burden of proof at trial under a preponderance of the evidence standard. *See Grogan v. Garner*, 498 U.S. 279, 286 (1991) (in the absence of a statutory standard, the preponderance of the evidence standard is presumed to apply in civil actions unless particularly important individual interests or rights are at stake).[15]

C. PBGC's proposed December 30, 2004 termination date

If PBGC proves that the Pilot Plan must he terminated, it will be necessary to consider whether the notice it provided was sufficient to establish a termination date of December 30, 2004. Where, as here, PBGC and the plan administrator do not agree upon a termination date, the court must set one. 29 U.S.C. § 1348(a)(3), (4). Courts use a two-step process for establishing a termination date, taking into account (1) "the expectations of the plan participants" and (2) "the financial implications of the termination for PBGC." *See PBGC v. Republic Techs. Intl., LLC*, 386 F.3d 659, 665 (6th Cir. 2004) (collecting authorities). In that process, courts first determine the earliest date by which the plan participants had actual or

---

[15] The APA, as it applies to formal administrative hearings, places the burden of proof on the proponent of a rule or order. 5 U.S.C. § 556(d) ("[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."). Thus, if PBGC had been required to provide a formal agency hearing, its staff would have had the burden of proof with respect to plan termination. The fact that Congress provided for court adjudication under § 1342(c) as an alternative to a formal agency hearing further supports placing the burden of proof on PBGC as the proponent of the order adjudicating that the Pilot Plan must be terminated.

constructive notice of termination, since such actual or constructive n[illegible] is seen as effective to extinguish reliance interests. *See Republic Techs.*, 386 F.3d at 666; *PBGC. v. Broadway Maint. Corp. (In re Pension Plan for Employees of Broadway Maint. Corp.)*, 707 F.2d 647, 652-53 (2d Cir. 1983); *see also Eckstein v. Balcor Film Investors*, 58 F.3d 1162, 1168 (7th Cir. 1995) (defining constructive notice as "not actual knowledge, but the ability to acquire knowledge by reasonably diligent inquiry"). Courts then select that date unless a later one better serves the interests of PBGC. *See Republic Techs.*, 386 F.3d at 667-68.

Rule 56(d) allows a court to narrow the issues for trial by determining facts not in controversy even when summary judgment cannot be granted. Fed. R. Civ. P. 56(d), incorporated by reference in Fed. B. Bankr. P. 56. *See Doctors Hosp. v. Desnick (In re Doctors Hosp.)*, Adversary No. 02 A 00363 (Bank. No. 00 B 11520), 2005 WL 2347899 (Bankr. N.D. Ill. Sept. 22, 2005); *Carillo v. Bridgestone/Firestone, Inc.*, No. IP 00-9373-C-B/S, IP 00-5005-C-B/S, 2002 WL 1011781 at *1 (S.D. Ind. May 13, 2002); *First Nat'l Ins. Co. v. F.D.I.C.*, 997 F. Supp. 1051 1055 (S.D. Cal. 1.997). Because there are no genuine issues of fact for trial, an order pursuant to Rule 56(d) is appropriate here to establish a termination date.

The undisputed facts demonstrate that the participants of the Pilot Plan received notice sufficient to extinguish any justifiable expectation that the plan would continue. The Notice of Determination was sent by PBGC on December 29, 2004, and received by ALPA the next day, December 30, 2004. Also, on December 30, 2004, the Notice of Determination was published in newspapers throughout the country. In addition, PBGC, United and ALPA, published press releases announcing PBGC decision to seek termination of the Pilot Plan.

United argues that the reasonable expectations of the plan participants weighed so heavily against PBGC's proposed termination date that their expectations should override the impact of notice. However, that is not the applicable standard. *See Republic Techs.*, 386 F.3d at 666 (reversing a ruling that "PBGC's notice to the participants did not presumptively terminate the participants' reliance interests" and noting that "[e]very court to consider the issue has concluded that expectation interests in the accrual of benefits are extinguished on the date the participants receive reasonable notice from PBGC that the plan is going to be terminated"). The Pilot Plan participants' expectation interests were extinguished on December 30, 2004, when they received reasonable notice from PBGC that it was seeking termination of the Pilot Plan. Moreover, PBGC was not required, as ALPA suggests, to provide individualized notice to each of the approximately 15,000 participants of the Pilot Plan.

To answer the second question—what date serves the interests of PBGC—the court need look no farther than PBGC's proposed date. *See PBGC Mize Co., Inc.*, 987 F.2d 1059, 1063 (4th Cir.1993) ("PBGC's interests should be deemed to be best served by the date proposed by PBGC.") There is no question that PBGC is better served by the December 30 date than some later date, and so the requirements for an effective notice on tht date have been satisfied.

Conclusion

For the reasons stated above, the question of whether plan termination is appropriate must be adjudicated at trial but PBGC is entitled to an order establishing that its notice of December 30, 2004 termination date was effective. A separate order has been entered consistent with this decision.

Dated: October 26, 2005

/s/ Eugene R. Wedoff
EUGENE R. WEDOFF
United States Bankruptcy Judge

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Chapter 11
Case No. 02 B 48191
Adversary No. 05 A 00481

In re: UAL CORPORATION, *et al.*,
Debtors.

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff,

v.

UNITED AIR LINES, INC., as Plan Administrator for the United Airlines Pilot Defined Benefit Pension Plan,
Defendant,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, UNITED RETIRED PILOTS BENEFIT PROTECTION ASSOCIATION, ROGER D. HALL, DENNIS D. DILLON, GERARD TERSTIEGE, EUGENE M. CUMMINGS, RAYMOND P. FINK, JAMES M. KRASNO and WILLIAM L. RUTHERFORD,
Intervenors.

MEMORANDUM OF DECISION

This adversary proceeding, brought by the Pension Benefit Guaranty Corporation ("PBGC"), seeks a decree terminating a pension plan sponsored by United Air Lines ("United"), whose Chapter 11 bankruptcy case is pending in this court. The proceeding is before the court for judgment after trial. The issue for trial was whether termination of the plan in question—the United Airlines Pilot Defined Benefit pension

Plan (the "Pilot Plan")—was necessary, as of December 30, 2004, "to avoid . . . any unreasonable increase in the liability of [PBGC's insurance] fund." 29 U.S.C. § 1342(c). As discussed below, PBGC established by a preponderance of the evidence that termination was necessary to avoid an unreasonable increase in liability. Judgment will therefore be entered in favor of PBGC, ordering termination of the plan as of December 30, 2004.

Jurisdiction and Factual Background

This proceeding was previously before the court on PBGC's motion for summary judgment. As set out in the opinion denying that motion, this is a core proceeding under 28 U.S.C. § 157(b)(2)(A) as to which the court may enter a final judgment. *See Amended Memorandum of Decision on Motion for Summary Judgment*, at 2-3.

The undisputed background facts, reflected in the summary judgment opinion, can be summarized briefly. Pursuant to a collective bargaining agreement that it entered into with the Air Line Pilots Association, International ("ALPA"), United has maintained the Pilot Plan, offering benefits to approximately 15,000 active, retired, and terminated employees. On December 29, 2004, PBGC made an administrative determination under 29 U.S.C. § 1342(a)(4) that the Pilot Plan should he terminated as of December 30, and notified both United and ALPA of this determination. On December 30, notice of the determination was issued through advertisements in major newspapers, press releases, and announcements on the web-sites of the PBGC, United, and ALPA. As required by an agreement that it had reached with ALPA, United, as plan administrator, did not agree to termination of the plan as of December 30, although it had long maintained that the plan needed to be terminated.

In addition to providing notice of its administrative determination on December 30, PBGC also filed a complaint

against United in the district court, seeking a judicial decree adjudicating that the plan must he terminated pursuant to 29 U.S.C. § 1342(c). That complaint was referred to this court and became the pending adversary proceeding. ALPA intervened in the proceeding, as did the United Retired Pilots Benefit Protection Association ("URPBPA"), a not-for-profit Illinois corporation formed in connection with United's bankruptcy to protect the pension benefits of its members.

PBGC moved for summary judgment, asserting that the court's role under § 1342(c) was to review PBGC's decision that termination was necessary, using the "arbitrary and capricious" standard applicable to judicial review of informal agency action under the Administrative Procedure Act. 5 U.S.C. § 706. In ruling on this aspect of the motion, this court held, to the contrary, that PBGC had to prove by a preponderance of the evidence the elements for relief under § 1342(c)—that is, that termination of the Pilot Plan was necessary "in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or to avoid any unreasonable increase in the liability of [PBGC's insurance] fund." Because there were facts in dispute regarding this issue, summary judgment was denied. At the same time, however, PBGC sought a determination of the sufficiency of its notice of termination on December 30, 2004. Here, the court ruled that the uncontested facts established that the notice was effective. Thus, if PBGC established its case for termination as of December 30, that would be the effective date for termination of the Pilot Plan.

The pretrial submissions of the parties limited the issue for trial to the final ground for termination set out in § 1342(c): whether termination of the Pilot Plan as of December 30, 2004 was necessary to avoid an "unreasonable increase in the liability of the fund."

Findings of Fact

Most of the evidence at trial involved the extent of the loss that PBGC's fund would incur if termination of the Pilot Plan were delayed until after December 30, 2004. PBGC presented testimony from two actuaries on this question; ALPA and URPBA presented testimony from one additional actuarial expert apiece. The only other witness was a PBGC attorney whose testimony was ruled largely inadmissible. The documentary evidence consisted of excerpts from PBGC's administrative record and other internal documents (PBGC Ex. 1; ALPA Ex. 16-19); the agreements between United and ALPA, modifying their collective bargaining agreement, entered into during December 2004 (PBGC Ex. 3; ALPA Ex. 5) and January 2005 (ALPA Ex. 6); and reports and other materials prepared by the parties' expert witnesses (PBGC Ex. 4 and 5; ALPA Ex. 9, 13, and 21-25; URPBPA Ex. 1 and 2). United introduced no evidence.

The major factual disagreement—the precise extent of the increase in PBGC's liability that would result from termination of the Pilot Plan after December 30, 2004—is a narrow one. PBGC's experts testified that if the plan were terminated in January 2005 instead of December 2004, PBGC's liability would increase by $44 million; ALPA's expert testified that the increase would be $39 million. PBGC's experts testified that each month of further delay, through June 2005, would add $9.5 million to this increase in liability; ALPA's expert put the monthly increase at $6.7 million. See A.LPA Ex. 21. Thus, PBGC contends that the total increase in its liability for the Pilot Plan from December 2004 through June 2005 would be $101 million, whereas ALPA contends that the increase would be $79 million. URPBPA's expert did not opine on this issue.

Under the legal standard applied below, these differences in calculating increased liability do not affect the need for plan termination on December 30, 2004. Nevertheless, the

weight of evidence supports PBGC's position as to the January increase and ALPA's position as to the monthly increases thereafter.

As to the initial increase in liability, the experts agreed that a statutory increase in the maximum guaranteed pension would result in a substantial increase in PBGC liability since many participants in the Pilot Plan were entitled to plan benefits in excess of the amount guaranteed by PBGC. For each of these participants, an increase in maximum benefits guaranteed by PBGC that became effective January 1, 2005 would add to the fund's liability if the plan were not terminated before that date. PBGC documented its calculation of this increased liability, and ALPA's expert gave no reason for his lower estimate.

However, as to the difference in monthly increases thereafter, PBGC failed to document its correction of an initial, acknowledged error in calculating the impact of a non-terminated plan paying benefits in excess of guaranteed amounts. See PBGC Ex. 6, with an imbedded footnote failing to reflect the correction. Moreover, ALPA's expert used a methodology that consistently reduced the monthly liability increases to present value. PBGC criticized this methodology as failing to account for factors affecting PBGC liability that were independent of the termination date, but PBGC did not demonstrate any such independent factors that would have artificially lowered the liability increase resulting from termination delay. In the end, then, the balance of the evidence adduced at trial indicates that PBGC faced an immediate liability increase of $44 million if the Pilot Plan were terminated in January 2005 rather than December 30, 2004, and that its liability would increase by $6.7 million each month thereafter through June 2005, resulting in a total. increase in liability as of that date in the amount of $84.2 million.

Conclusions of Law

The *applicable standard.* Whatever the increase in liability that PBGC would incur as a result of the Pilot Plan terminating after December 2004, the real question is whether the increase would he "unreasonable," as required for termination under § 1342(c). ALPA argues that the increase—whether $79 million, $101 million, or some point in between—would not be unreasonable, because the entirety of any such increase would be the result of the ordinary application of statutory provisions to the operation of the plan. And indeed, there were no "extraordinary" events, such as plan amendments becoming effective after the proposed termination date, that would have increased the liability. PBGC, on the other hand, argues that any substantial increase in its liability for a plan—regardless of the cause of the increase—would be unreasonable under the statute and that, accordingly, an increase in the millions of dollars necessarily satisfies the requirement for plan termination.

There is room for dispute here, since the statute provides no definition of reasonableness in this context, and there is little helpful case law[1] or legislative his-

---

[1] The only published opinion discussing the meaning of an "unreasonable increase" in PBGC liability under § 1342(e), holds—contrary to the result reached by this court—that § 1342(c) places no burden on PBGC to establish an unreasonable increase in its liability, but rather requires parties opposing termination to establish that PBGC had acted arbitrarily or capriciously in asserting that such an increase would occur. *In re Pan American World Airways, Inc. Cooperative Ret. Inc. Plan*, 777 F. Supp. 1179, 1182 (S.D.N.Y. 1991). In that context, the court stated that an "unreasonable increase" in liability might be any increase in excess of "a slight or insubstantial deterioration in a plan's condition," caused, for example, by "day to day deviations as the normal vagaries of a plan's investments." *Id.* at 1182-83. The court applied this interpretation because there was "no showing" that it was incorrect. *Id.* It is questionable whether the court would have applied this interpretation had it placed the burden of establishing an unreasonable liability increase on PBGC.

tory.[2] Nevertheless, the Operation of § 1342(c) in the overall structure of ERISA, together with the change in its language enacted in 1980, indicates that an "unreasonable" increase in liability must involve both a monetarily significant increase in PBGC's liability and a plan likely to terminate in an underfunded condition, so that the increase in liability would be reflected in an actual additional loss for PBGC's insurance fund.

PBGC v. Heppenstall Co., 633 F.2d 293, 295-97 (3d Cir. 1980), the first court of appeals decision to address ERISA's program of pension insurance, explains the basic features of the program. PBGC administers a fund to guarantee minimum benefits to participants in pension plans that terminate without sufficient assets to pay the benefits promised. PBGC's fund is self-financed, primarily through premiums charged to the plans covered by the insurance program. When a plan operates without sufficient funding, PBGC's liability to the plan participants can increase in several ways, including depletion of the plan assets and increases in PBGC's guaranteed payouts if PBGC and the plan administrator (usually the employer) agree that an underfunded plan should be terminated as of a particular date, PBGC takes over

---

[2] As discussed in *Pan Am*, 777 F.Supp at 1182, the unreasonable increase" language now in § 1342(c) was "further increase" in the original version of ERISA. The change was made by § 402(a)(6)(D) of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364. However, this change was not mentioned either in the House Report on this legislation, H.R. Rep. No. 96-869, or in any of the floor debates. Two committee prints on the legislation merely reflect the changed language in § 1342(c), offering no analysis of the impact of the change or its rationale. Staff of Subcomm. on Labor-Management Relations of House Education and Labor Comm., Changes in Existing Law Made by the Bill H.R. 3900 49 (Comm. Print 1980); Staff of Sen. Comm. on Labor and Human Resources, S. 1076 The Multiemployer Pension Plan Amendments Act of 1980 Summary and Analysis of Consideration 100, 246 (Comm. Print 1980).

administration of the plan's assets as trustee and begins paying the benefits defined by statute as of the termination date. If the plan administrator does not agree to a termination date PBGC proposes, then PBGC must obtain a judicial decree terminating the plan and establishing the termination date.

In *Heppenstall*, the court was required to determine what standards should govern a court's choice of a termination date under 29 U.S.C. § 1348(b)(2). The court approached this question by identifying the competing interests involved: PBGC's interest as an insurer in promptly terminating an underfunded plan in order to avoid additional losses to its insurance fund, and the plan participants' interest in receiving expected plan benefits. *Heppenstall*, 633 F.2d at 301-02. A similar approach is appropriate in defining the unreasonable increase in liability" that requires termination of a plan under § 1342(c). This ground for termination balances the same interests that *Heppenstall* considered—PBGC's interest as insurer is advanced by terminating a plan if continued operation will likely deplete PBCG's insurance fund; the participants' interest in receiving expected benefits is advanced by not terminating a plan if such depletion is unlikely.

The likelihood of a depletion of PBGC's fund, then, is the touchstone, and it implies the consideration of both increased liability and likelihood of plan termination. First, even with a severely underfunded plan, continued operation may not lead to increased liability for PBGC. If the plan's own benefits are below the statutorily guaranteed levels and payouts under the plan are not increasing, continued operation of the plan will not increase PBGC's liability. Second, even if PBGG's liability does increase significantly, the increase will not lead to a loss to PBGC if the plan is be able to continue in operation successfully, through increased future contributions from the sponsor or otherwise. The increase in liability in this situation would not be "unreasonable."

The most plausible reading of the action Congress took in amending § 1342 (*see* n.2, *supra*) supports this interpretation. By changing "further increase" to "unreasonable increase," Congress necessarily recognized the possibility that PBGC could be required to accept certain increases in liability arising from continued operation of underfunded plans. Given the interests of the parties involved, these "reasonable" increases would be those resulting from plans that can operate successfully.

ALPA's contrary argument—that any increase in liability is reasonable if it occurs in the ordinary course of a plan's operation, rather than as a result of sonic extraordinary event such as a plan amendment—simply ignores the interest of the PBGC that involuntary termination is intended to protected. ALPA's interpretation would allow a plan to continue indefinitely, exhausting its assets, while PBGC's liability for guaranteed payments increased, so long as no extraordinary event intervened. There is no basis for reading such an intent into the statute.

Application of the standard. When the two-part standard for an unreasonable increase in liability is applied to the facts in this case, it becomes apparent that PBGC has established cause for termination. First, the increase of $44 million that PBGC would incur if termination does not occur before January 1, 2005, is certainly a significant amount. Liability increases of much smaller amounts have been seen as grounds for termination, without argument. *See, e.g., Heppenstall*, 633 F.2d at 300 (noting termination based on an increase in liability of $3-4 million). Although this increase may not be large in relation to PBGC's overall liability for the Pilot Plan, that cannot be the appropriate standard when PBGC's interest in protecting its fund is considered. The impact of increased liability on PBGC's insurance fund is not changed by total liability a particular plan presents. To protect

its fund, § 1342(c) allows PBGC to seek to avoid any significant increases in liability with respect to plans likely to fail.

Second, the only evidence bearing on the issue indicates that the Pilot Plan would not continue.[3] PBGC's administrative record reflected United's repeated statements in this case that termination of all of its defined benefit pension plans would he necessary for it to reorganize successfully, and United's agreements with ALPA and the PBGC contemplated such a termination. Accordingly, even though no witness testified on the subject, PBGC sustained its burden of establishing the likelihood of plan termination.

Conclusion

As discussed above, PBGC has shown that continued operation of the Pilot Plan beyond December 30, 2004 would result in an unreasonable increase in the liability of its fund, and so is entitled to a decree pursuant to 29 U.S.C. § 1342(c) terminating the plan as of that date. The decree will be issued in a separate document.

Dated: October 26, 2005

/s/ Eugene R. Wedoff
EUGENE H. WEDOFF
United States Bankruptcy Judge

---

[3] URPBPA's expert advanced the theory that termination of the Pilot Plan was not necessary because an amended defined benefit plan could be successfully implemented. However, the expert acknowledged that United was not willing to pursue such an amendment, and so this alternative, even if theoretically possible, was unlikely to occur.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

Case Number: 05 C 6955

PENSION BENEFIT GUARANTY CORPORATION,

v.

UNITED AIR LINES, INC.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that for the reasons stated in the Court's 2/2/06 memorandum opinion and order, the 10/26 and 10/28, 2005 final orders of the Bankruptcy Court are reversed; and the case is remanded for proceedings consistent with 28 U.S.C. 157(c). PBGC's appeal is dismissed as untimely. ALPA and URPBPA's appeals are dismissed as moot.

Michael W. Dobbins, Clerk of Court

Date: 2/2/2006 /s/ Michael Dooley, Deputy Clerk

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 05 C 6955
Honorable John W. Darrah

In re: UNITED AIR LINES, INC.,
Debtors.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, UNITED RETIRED PILOTS BENEFIT PROTECTION ASSOCIATION, ROGER D. HALL, DENNIS D. DILLON, GERALD TERSTIEG EUGENE M. CUMMINGS, RAYMOND P. FINK, JAMES M. KRASNO and WILLIAM L. RUTHERFORD,
Appellant and Cross-Appellees,

v.

PENSION BENEFIT GUARANTY CORP.,
Appellee and Cross-Appellant.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on the appeal and cross-appeal of the final judgments of the Bankruptcy Court of October 26 and October 28, 2005. For the reasons that follow, the decisions of the Bankruptcy Court as to the October 26 and October 28, 2005 orders are reversed.

BACKGROUND

United Air lines, Inc. provides many of its employees pension benefits under defined benefit pension plans. One of these defined plans is the United Air Lines Pilot Defined Benefit Pension Plan ("the Pilot Plan"). United is the plan sponsor and administrator. The Air Line Pilots Association

("ALPA") is the union that represents United's active pilots. The United Retired Pilots Benefit Protection Association ("URPBPA") is an Illinois non-profit corporation which was formed by a group of retired United pilots to protect the retirement benefits of pilot retirees, survivors, and dependants. Roger Hall, Dennis D. Dillon, Gerald Terstiege, Eugene M. Cummings, Raymond P. Fink, James M. Krasno, and William L. Rutherford are retired United Captains who serve on URPBPA's Board of Directors.

The Pension Benefit Guaranty Corporation ("PBGC") is a wholly-owned United States government corporation established under 29 U.S.C. § 1302(a) to administer the pension plan termination insurance program established by Title IV of the Employee Retirement Income Security Act ("ERISA"). The PBGC guarantees the payment of certain, but not all, pension benefits provided by defined benefit pension plans that are covered by Title IV of ERISA.

On December 9, 2002, United filed a voluntary petition under Chapter 11 of Title 11, United States Code. In November 2004, United stated that it would seek the termination of the Pilot Plan and its other defined pension plans via a two-step process. First, United would attempt to satisfy the requirements of 11 U.S.C. § 1113 and remove any contractual obligations that required United to maintain the Pilot Plan. Second, United would attempt to satisfy ERISA's requirements for distress termination.

On November 24, 2004, United initiated negotiations with ALPA regarding the Pilot Plan. After URPBPA sought to be included in the negotiations related to the Pilot Plan, and United refused to include URPBPA in these discussions, URPBPA filed a motion with the Bankruptcy Court, requesting the appointment of an authorized representative to represent United's retired pilots and their pension benefits. The Bankruptcy Court denied URPBPA's motion, and that order is on appeal before the Seventh Circuit Court of Appeals.

As a result of their negotiations, United and ALPA reached a Section 1113 Agreement. On December 17, 2004, United filed a Motion to Approve Letter of Agreement Modifying Their Collective Bargaining Agreement with ALPA. United's initial motion was denied. Subsequently, United filed for approval of a modified version of the agreement. Both the original and modified versions of the agreement provided, in pertinent part, that ALPA would not "oppose the Company's efforts to terminate the A Plan under 29 U.S.C. § 1341(c)" as long as United did not seek to terminate the Pilot Plan before May 2005. Both versions also provided that the Pilot Plan would "remain in full force and effect" until United met the requirements for a distress termination under 29 U.S.C. § 1341, and that nothing in the Letter of Agreement "shall be construed, deemed or characterized by UAL or the Company as any agreement of any form by the Association that the A Plan should be terminated."

On December 29, 2004, the PBGC sent a Notice of Determination to Glenn Tilton (United's Chairman, President and CEO, informing Tilton that PBGC had determined that the Pilot Plan "must be terminated because the possible long-run loss of the corporation with respect to the Plan may reasonably be expected to increase unreasonably if the Plan is not terminated." PBGC stated that the effective date of the termination would be December 30, 2004.

On December 30, 2004, PBGC filed a Complaint in the United States District Court for the Northern District of Illinois, pursuant to 29 U.S.C. §§ 1342 and 1348(a), seeking: (1) an order terminating the Pilot Plan sponsored by United; (2) appointing PBGC as the statutory trustee of the Pilot Plan; (3) establishing December 30, 2004 as the termination date of the Pilot Plan; and (4) requiring that United convey all relevant documents to PBGC. PBGC's Complaint, Civil Case No. 04 C 8338, was assigned to Judge Joan Lefkow.

On January 4, 2005, United moved for referral of the termination action to the Bankruptcy Court. On January 6, 2005, PBGC filed it opposition to the referral to the Bankruptcy Court and, in the alternative, sought to withdraw the reference. Shortly thereafter, ALPA and URPBPA sought to intervene in the District Court action. On January 25, 2005, Judge Lefkow granted United's motion to confirm the automatic referral of the case to the Bankruptcy Court and denied PBGC's motion to withdraw the reference. During the hearing, Judge Lefkow agreed with PBGC's counsel that the termination proceeding was a non-core proceeding.[1] The motions to intervene were also referred to the Bankruptcy Court. PBGC moved for reconsideration of the referral to the Bankruptcy Court or, in the alternative, for a certification to file an interlocutory appeal. The motion remains pending.

On April 13, 2005, the Bankruptcy Court ruled that discovery beyond the administrative record would be permitted. On June 6, 2005, PBGC filed a motion for summary judgment, arguing that PBGC's decision to seek termination of the Pilot Plan was entitled to judicial deference and that its decision to initiate termination had not been arbitrary or capricious. PBGC also argued that it had provided sufficient notice to the plan participants to set the termination date as December 30, 2004. United, ALPA, and URPBPA opposed PBGC's motion for summary judgment.

On August 26, 2005, the Bankruptcy Court issued a preliminary ruling on PBGC's motion for summary judgment. On October 26, 2005, the Bankruptcy Court issued an Amended Memorandum of Decision on Motion for Summary

---

[1] Ms. Hermans: —and that is of judicial economy. Counsel for United is confused. The—the bankruptcy court—because this is a non-core proceeding, and clearly it is, it does not arise only in the context of a bankruptcy court—

The Court: I agree with you.

Judgment. The Bankruptcy Court ruled that PBGC's adversary proceeding was a core proceeding; therefore, the Bankruptcy Court entered final judgment. As to the merits of the motion, the Bankruptcy Court held that a trial was required as to whether PBGC established the propriety of terminating the Pilot Plan by a preponderance of the evidence. The Bankruptcy Court held that Section 1342(c) required *a de novo* determination of the appropriateness of the Pilot Plan termination, and not a deferential review under the Administrative Procedures Act. The Bankruptcy Court also held that the constructive notice to the Pilot Plan participants was sufficient to establish a termination date of December 30, 2004.

A bench trial on PBGC's Complaint was commenced on September 21, 2005. On October 26, 2005, the Bankruptcy Court issued its Memorandum of Decision. The Bankruptcy Court held that PBGC showed that continued operation of the Pilot Plan beyond December 30, 2004, would result in an unreasonable increase in PBGC's liability of its fund; therefore, PBGC was entitled to a decree terminating the Pilot Plan pursuant to 29 U.S.C. § 1342(c) as of December 30, 2004. On October 28, 2005, the Bankruptcy Court entered its order terminating the Pilot Plan retroactive to December 30, 2004.

On November 4, 2005 and November 7, 2005, respectively, ALPA and URPBPA filed notices of appeal. On November 16, 2005, PBGC filed its cross-appeal. The parties' appeals of the Bankruptcy Court's final orders were assigned to this Court, Civil Case No. 05 C 6955.

LEGAL STANDARD

A bankruptcy court's interpretation of statute is a question of law reviewed *de novo. See Meyer v. Rigolon*, 30 F.3d 1375, 1378 (7th Cir. 1994). Similarly, a bankruptcy court's grant of summary judgment is reviewed *de novo. Hoseman v. Weinschneider*, 322 F.3d 468, 473 (7th Cir. 2003) *(Hose-*

man). All of the facts and the inferences drawn therefrom are viewed in the light most favorable to the nonmoving party. *Hoseman*, 322 F.3d at 473. The court reviews the bankruptcy court's factual findings for clear error. *Hoseman*, 322 F.3d at 473.

ANALYSIS

PBGC raises three issues on appeal: (1) the District Court erred in referring the termination proceeding to the Bankruptcy Court, (2) the Bankruptcy Court erred in finding the termination was a core proceeding, and (3) the Bankruptcy Court erred by holding a de novo trial. In its response brief to PBGC's appeal, URPBPA joins in PBGC' s argument that the Bankruptcy Court did not have jurisdiction (PBGC's first two grounds of appeal) to enter a final order in the adversary proceeding. United argues, *inter alia,* that PBGC's cross-appeal should be dismissed as untimely.

Pursuant to 28 U.S.C. § 158, a party may appeal the final judgment of a bankruptcy court to an appropriate district court. The notice of appeal must be filed with the clerk within ten days of the date of the entry of the judgment, order, or decree being appealed. Fed. R. Bank. P. 8002(a). However, if a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days of the date of which the first notice of appeal was filed. Fed. R. Bank. P. 8002(a). The time frames prescribed by Rule 8002(a) are conditions precedent that are mandatory and jurisdictional. *See In re Bond*, 254 F.3d 669, 673 (7th Cir. 2001).

Here, the Bankruptcy Court entered the termination order on October 28, 2005. ALPA filed a timely notice of appeal on November 4, 2005. However, PBGC did not file its appeal until November 16, 2005 - twelve days after the first notice of appeal was filed. Accordingly, PBGC's cross-appeal is untimely and is dismissed.

However, PBGC, as cross-appellant and appellee, and URPBPA (including the individual intervenors) raise issues of the Bankruptcy Court's jurisdiction, which may be raised at any time, including during the appeal. *See Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). Accordingly, PBGC and URPBPA's jurisdiction argument is addressed by the Court.[2]

PBGC and URPBPA argue that the Bankruptcy Court did not have jurisdiction to enter a final judgment in the termination proceeding because the termination was not a core proceeding.

Bankruptcy courts have jurisdiction to adjudicate and issue final orders and judgments in matters constituting core proceedings. *See* 28 U.S.C. § 157(b)(1), Although the statute does not define "core," Section 157(b)(2) sets forth a non-exclusive list of matters that constitute a core proceeding. This non-exclusive list includes "matters concerning the administration of the estate," 28 U.S.C. § 157(b)(2)(A), and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor . . . relationship . . . ." 28 U.S.C. § 157(b)(2)(O).

However, a non-core proceeding cannot be reclassified as a core proceeding by simply declaring that the matter either concerns the administration of the estate or affects the liquidation of the assets. *See In re Comdisco Ventures, Inc.*, 2004 WL 1375353 (N.D. Ill. June 18, 2004) (*In re Comdisco*); *In re CIS Corp.*, 172 B.R. 748, 757 (S.D.N.Y. 1994) (*In re CIS*). Instead, "a proceeding is core . . . if it invokes a substantive right provided by title 11 or if it is a proceeding

---

[2] This Court has jurisdiction over the appeal of the Bankruptcy Court's final judgment. *See 28* U.S.C. § 158(a). PBGC's appeal of the District Court's referral cannot be heard by this Court as this Court lacks jurisdiction over an appeal of another District Court's decision, and the Bankruptcy Court made no rulings as to this issue. Accordingly, this issue is not addressed by this Court.

that, by its nature, could arise only in the context of a bankruptcy case." *Barnett v. Stern*, 909 F.2d 973, 981 (7th Cir. 1990) *quoting In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987). In slightly different terms, the Seventh Circuit has defined core proceedings as:

> actions by or against the debtor that arise under the Bankruptcy Code in the strong sense that the Code itself is the source of the claimant's right or remedy, rather than just the procedural vehicle for the assertion of a right conferred by some other body of law, normally state law . . . . The fact that it is an *important* right to the bankrupt . . . is irrelevant.

In re US. Brass Corp, 110 F.3d 1261, 1268 (7th Cir. 1997).

Bankruptcy courts may also hear non-core proceedings that are otherwise related to the bankruptcy case. *See* 28 U.S.C. § 157(c)(1). The bankruptcy court's jurisdiction to hear non-core proceedings is limited. *See In re Hanno*, 254 B.R. 732, 738 (N.D. Ill. 2000); *In re Markos Gurnee Partnership*, 182 B.R. 211, 220 (N.D. Ill. 1995). In non-core proceedings, which are also undefined in the statute, the bankruptcy court may issue findings of fact and conclusions of law but is not empowered to issue final orders unless the parties consent to the bankruptcy court's issuing a final order. *See* 28 U.S.C. 157(c). The bankruptcy court's findings of fact and conclusions of law are then reviewed *de novo* by the district court. *See* 28 U.S.C. 157(c)(1).

Here, PBGC brought a proceeding to terminate the Pilot Plan in district court pursuant to Title IV of ERISA, 29 U.S.C. § 1342(a)(4), (c). Title IV of ERISA is the exclusive means of terminating a defined benefit pension plan. 29 U.S.C. § 1341(a)(1); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999). Termination proceedings may be filed notwithstanding any pending bankruptcy proceeding. 29 U.S.C § 1342(c). PBGC brought the proceeding against

United as the plan administrator, not as the debtor in the pending bankruptcy.

PBGC's right to initiate the termination proceeding of the Pilot Plan arises exclusively from Title IV of ERISA, not the Bankruptcy Code. *See* 29 U.S.C. §§ 1341(a); 1342(a). The right to bring the termination proceeding exists outside the Bankruptcy Code and can arise outside the context of a bankruptcy case. *See* 29 U.S.C. § 1342(a). Accordingly, the termination proceeding neither invokes a substantive right provided by Title 11 nor, by its nature, could it arise only in the context of a bankruptcy case.

In light of the above, United, the only party that contends that the proceeding was a core proceeding, argues that the involuntary termination proceeding was a core proceeding because whether and when the Pilot Plan was terminated affected PBGC's claim that arose once the Pilot Plan was terminated; therefore, the termination proceeding affected the administration of the estate and/or the debtor-creditor relationship. However, the mere fact that the proceeding may ultimately affect the size of the estate does not mandate that the proceeding is a core proceeding. *See Diamond Mortgage Corp. of Ill. v. Sugar*, 913 F.2d 1233, 1239 (7th Cir. 1990) (malpractice and breach of contract suit resolution which may have a direct and substantial impact on the asset pool available for distribution to the estate was a non-core proceeding); *In re State Brass*, 110 F.3d at 1268-69 (fact that bankrupt party was seeking $500 million in insurance coverage that could affect size of estate did not turn state contract law claim relating to the insurance coverage into a core proceeding); *In re CIS*, 172 B.R. at 757 (legal proceeding that could determine that the debtors were the legal titleholders to certain property, while benefitting the bankrupt estate, was insufficient to make the proceeding a core proceeding); *In re Comdisco*, 2004 WL 1375353 at *4 (claims that might benefit debtor estate that did not constitute a

substantive right granted by Title 11 constituted non-core proceedings).

Furthermore, any additional effect on the debtor-creditor relationship is tenuous. The termination proceeding was brought by PBGC as the federal agency that enforces Title IV of ERISA, not in the role of a creditor. In addition, United is a party to the proceeding not as the debtor but as the plan administrator. Had a person or entity other than United been the plan administrator, United would not have been a party to the proceeding. In addition, while the termination proceeding may ultimately affect United's bankruptcy case, it does not concern the administration of the estate or involve estate assets within the meaning of Section 157(b)(2) of the Bankruptcy Code because plan assets are not part of a bankruptcy estate. *See Patterson v. Shumate*, 504 U.S. 753, 760 (1992).

Based on the above, the termination proceeding filed by PBGC pursuant to Title IV of ERISA was a non-core proceeding. Because the proceeding was a non-core proceeding and the parties did not consent to the Bankruptcy Court's issuing a final judgment, the Bankruptcy Court exceeded its limited jurisdiction by issuing a final judgment instead of submitting proposed findings of fact and conclusions of law to the district court (in this instance, Judge Joan Lefkow in Civil Case 04 C 8338), as required by Section 157(c)(1). Accordingly, the October 26 and October 28, 2005 final judgments of the Bankruptcy Court are reversed; and the case is remanded for proceedings consistent with 28 U.S.C. 157(c).

In light of the above ruling, ALPA and URPBPA's appeals are dismissed as moot.

CONCLUSION

Based on the foregoing, the October 26 and October 28, 2005 final orders of the Bankruptcy Court are reversed; and the case is remanded for proceedings consistent with 28 U.S.C. 157(c). PBGC's appeal is dismissed as untimely. ALPA and URPBPA's appeals are dismissed as moot.

Dated: February 2, 2006

/ s/ John W. Darrah
JOHN W. DARRAH
United States District Court Judge

APPENDIX G

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Chapter 11
Case No. 02-B-48191
(Jointly Administered)

Adversary Proc. No. 05-481

Honorable Eugene R. Wedoff

In re: UNITED AIR LINES, INC., *et al.*,
Debtors.

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff,

vs.

UNITED AIR LINES, INC., as Plan Administrator for the United Airlines Pilot Defined Benefit Pension Plan,
Defendant,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, UNITED RETIRED PILOTS BENEFIT PROTECTION ASSOCIATION, ROGER D. HALL, DENNIS D. DILLON, GERARD TERSTIEGE, EUGENE M. CUMMINGS, RAYMOND P. FINK, JAMES M. KRASNO and WILLIAM L. RUTHERFORD,
Intervenors.

ORDER TERMINATING THE UNITED AIRLINES PILOT DEFINED BENEFIT PENSION PLAN

This adversary proceeding having come before the court on Pension Benefit Guaranty Corporation's ("PBGC") complaint (the "Complaint") to terminate the United Airlines Pilot Defined Benefit Pension Plan (the "Plan"); the court having

considered the briefs and arguments of the parties, and having conducted a trial on the merits of PBGC's Complaint; it is hereby ordered, for the reasons stated in the Memorandum of Decision issued in connection herewith:

1. Judgment is entered in favor of PBGC with respect to its request to terminate the Plan;

2. The Plan is terminated pursuant to 29 U.S.C. § 1342;

3. The termination date of the Plan is December 30, 2004, pursuant to 29 U.S.C. 1348;

4. PBGC is appointed statutory trustee of the Plan pursuant to 29 U.S.C. § 1342; and

5. United, its agents, and any other person or entity having possession, custody, or control of any records, assets, or other property of the Plan, and any documents required to determine the benefits payable to participants of the Plan, shall transfer, convey, and deliver all such records, assets, property, and documents to PBGC.

Dated: October 26, 2005
Chicago, Illinois

/s/ Eugene R. Wedoff
HON. EUGENE R. WEDOFF
United States Bankruptcy Judge

APPENDIX H

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Chapter 11
Case No. 02 B 48191
Adversary No. 05 A 00481

In re: UAL CORPORATION, *et al.*,
Debtors.

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff,

v.

UNITED AIR LINES, INC., AS PLAN ADMINISTRATOR FOR THE UNITED AIRLINES PILOT DEFINED BENEFIT PENSION PLAN,
Defendant,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, UNITED RETIRED PILOTS BENEFIT PROTECTION ASSOCIATION, ROGER D. HALL, DENNIS D. DILLON, GERARD TERSTIEGE, EUGENE M. CUMMINGS, RAYMOND P. FINK, JAMES M. KRASNO AND WILLIAM L. RUTHERFORD,
Intervenors.

MEMORANDUM OF DECISION

This adversary proceeding, brought by the Pension Benefit Guaranty Corporation ("PBGC") seeks a decree terminating a pension plan sponsored by United Air Lines ("United"), whose Chapter 11 bankruptcy case is pending in this court. The proceeding is before the court for judgment after trial. The issue for trial was whether termination of the plan

tion—the United Airlines Pilot Defined Benefit Pension Plan (the "Pilot Plan")—was necessary, as of December 30, 2004, "to avoid . . . any unreasonable increase in the liability of [PBGC's insurance] fund." 29 U.S.C. § 1342(c). As discussed below, PBGC established by a preponderance of the evidence that termination was necessary, to avoid an unreasonable increase in liability- Judgment will therefore be entered in favor of PBGC, ordering termination of the plan as of December 30, 2004.

Jurisdiction and Factual Background

This proceeding was previously before the court on PBGC's motion for summary judgment. As set out in the opinion denying that motion, this is a core proceeding under 28 U.S.C. § 157(b)(2)(A) as to which the court may enter a final judgment. *See Amended Memorandum of Decision on Motion for Summary Judgment*, at 2-3.

The undisputed background facts, reflected in the summary judgment opinion, can be summarized briefly. Pursuant to a collective bargaining agreement that it entered into with the Air Line Pilots Association, International ("ALPA"), United has maintained the Pilot Plan, offering benefits to approximately 15,000 active, retired, and terminated employees. On December 29, 2004, PBGC made an administrative determination under 29 U.S.C. § 1342(a)(4) that the Pilot Plan should be terminated as of December 30, and notified both United and ALPA of this determination. On December 30, notice of the determination was issued through advertisements in major newspapers, press releases, and announcements on the web-sites of the PBGC, United, and ALPA. As required by an agreement that it had reached with ALPA, United, as plan administrator, did not agree to termination of the plan as of December 30, although it had long maintained that the plan needed to be terminated.

In addition to providing notice of its administrative determination on December 30, PBGC also filed a complaint against United in the district court, seeking a judicial decree adjudicating that the plan must be terminated pursuant to 29 U.S.C. § 1342(c). That complaint was referred to this court and became the pending adversary proceeding. ALPA intervened in the proceeding, as did the United Retired Pilots Benefit Protection Association ("URPBPA"), a not-for-profit Illinois corporation formed in connection with United's bankruptcy to protect the pension benefits of its members.

PBGC moved for summary judgment, asserting that the court's role under § 1342(c) was to review PBGC's decision that termination was necessary, using the "arbitrary and capricious" standard applicable to judicial review of informal agency action under the Administrative Procedure Act. 5 U.S.C. § 706. In ruling on this aspect of the motion, this court held, to the contrary, that PBGG had to prove by a preponderance of the evidence the elements for relief under § 1342(c)—that is, that termination of the Pilot Plan was necessary "in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or to avoid any unreasonable increase in the liability of [PBGC's insurance] fund." Because there were facts in dispute regarding this issue, summary judgment was denied. At the same time, however, PBGC sought a determination of the sufficiency of its notice of termination on December 30, 2004. Here, the court ruled that the uncontested facts established that the notice was effective. Thus, if PBGC established its case for termination as of December 30, that would be the effective date for termination of the Pilot Plan.

The pretrial submissions of the parties limited the issue for trial to the final ground for termination set out in § 1342(e): whether termination of the Pilot Plan as of December 30, 2004 was necessary to avoid an "unreasonable increase in the liability of the fund."

Findings of Fact

Most of the evidence at trial involved the extent of the loss that PBGC's find would incur if termination of the Pilot Plan were delayed until after December 30, 2004. PBGC presented testimony from two actuaries on this question; ALPA and URPBA presented testimony from one additional actuarial expert apiece. The only other witness was a PBGC attorney whose testimony was ruled largely inadmissible. The documentary evidence consisted of excerpts from PBGC's administrative record and other internal documents (PBGC Ex. 1; ALPA Ex 16-19); the agreements between United and ALPA, modifying their collective bargaining agreement, entered into during December 2004 (PBGC Ex. 3; ALPA Ex. 5) and January 2005 (ALPA Ex. 6); and reports and other materials prepared by the parties' expert witnesses (PBGC Ex. 4 and 5; ALPA Ex. 9, 13, and 21-25; URPBPA. Ex 1 and 2). United introduced no evidence.

The major factual disagreement—the precise extent of the increase in PBGC's liability that would result from termination of the Pilot Plan after December 30, 2004—is a narrow one. PBGC's experts testified that if the plan were terminated in January 2005 instead of December 2004, PBGC's liability would increase by $44 million; ALPA's expert testified that the increase would be $39 million. PBGC's experts testified that each month of further delay, through June 2005, would add $9.5 million to this increase in liability; ALPA's expert put the monthly increase at $6.7 million. *See* ALPA Ex. 21. Thus, PBGC contends that the total increase in its liability for the Pilot Plan from December 2004 through June 2005 would be $101 million, whereas ALPA contends that the increase would be $79 million. URPBPA's expert did not opine on this issue.

Under the legal standard applied below, these differences in calculating increased liability do not affect the need for plan termination on December 30, 2004. Nevertheless, the

weight of evidence supports PBGC's position as to the January increase, and ALPA's position as to the monthly increases thereafter.

As to the initial increase in liability, the experts agreed that a statutory increase in the maximum guaranteed pension would result in a substantial increase in PBGC liability since many participants in the Pilot Plan were entitled to plan benefits in excess of the amount guaranteed by PBGC. For each of these participants, an increase in maximum benefits guaranteed by PBGC that became effective January 1, 2005 would add to the fund's liability if the plan were not terminated before that date. PBGC documented its calculation of this increased liability, and ALPA's expert gave no reason for his lower estimate.

However, as to the difference in monthly increases thereafter, PBGC failed to document its correction of an initial, acknowledged error in calculating the impact of a non-terminated plan paying benefits in excess of guaranteed amounts. *See* PBGC Ex. 6, with an imbedded footnote failing to reflect the correction. Moreover, ALPA's expert used a methodology that consistently reduced the monthly liability increases to present value. PBGG criticized this methodology as failing to account for factors affecting PBGC liability that were independent of the termination date, but PBGC did not demonstrate any such independent factors that would have artificially lowered the liability increase resulting from termination delay. in the end, then, the balance of the evidence adduced at trial indicates that PBGC faced an immediate liability increase of $44 million if the Pilot Plan were terminated in January 2005 rather than December 30, 2004, and that its liability would increase by $6.7 million each month thereafter through June 2005, resulting in a total increase in liability as of that date in the amount of $84.2 million.

Conclusions of Law

The applicable standard. Whatever the increase in liability that PBGC would incur as a result of the Pilot Plan terminating after December 2004, the real question is whether the increase would be "unreasonable," as required for termination under § 1342(c). ALPA argues that the increase—whether $79 million, $101 million, or some point in between—would not be unreasonable, because the entirety of any such increase would be the result of the ordinary application of statutory, pro-visions to the operation of the plan. And indeed, there were no "extraordinary" events, such as plan amendments becoming effective after the proposed termination date that would have increased the liability. PBGC, on the other hand, argues that any substantial increase in its liability for a plan—regardless of the cause of the increase—would be unreasonable under the statute and that, accordingly, an increase in the millions of dollars necessarily satisfies the requirement for plan termination.

There is room for dispute here, since the statute provides no definition of reasonableness in this context, and there is little helpful case law[1] or legislative history.[2] Nevertheless,

---

[1] The only published opinion discussing the meaning of an "unreasonable increase" in PBGC liability under § 1342(c), holds-contrary to the result reached by this court—that § 1342(c) places no burden on PBGC to establish an unreasonable increase in its liability, but rather requires parties opposing termination to establish that PBGC had acted arbitrarily or capriciously in asserting that such an increase would occur. *In re Pan American World Airways, Inc. Cooperative Ret. Inc. Plan,* 777 F. Supp. 1179, 1182 (S.D.N.Y. 1991). In that context, the court stated that an "unreasonable increase" in liability might be any increase in excess of "a slight or insubstantial deterioration in a plan's condition," caused, for example, by "day to day deviations as the normal vagaries of a plan's investments." *Id.* at 1182-83. The court applied this interpretation because there was "no showing" that it was incorrect. *Id.* It is questionable whether the court would have applied this interpretation had it placed the burden of establishing an unreasonable liability increase on PBGC.

the operation of § 1342(e) in the overall structure of ERISA, together with the change in its language enacted in 1980, indicates that an "unreasonable" increase in liability must involve both a monetarily significant increase in PBGC's liability and a plan likely to terminate in an underfunded condition, so that the increase in liability would he reflected in an actual additional loss for PBGC's insurance fund.

PBGC v. Heppenstall Co., 633 F.2d 293, 295-97 (3d Cir. 1980), the first court of appeals decision to address ERISA's program of pension insurance, explains the basic features of the program. PBGC administers a fund to guarantee minimum benefits to participants in pension plans that terminate without sufficient assets to pay the benefits promised. PBGC's fund is self-financed, primarily through premiums charged to the plans covered by the insurance program. When a plan operates without sufficient funding, PBGC's liability to the plan participants can increase in several ways, including depletion of the plan assets and increases in PBGC's guaranteed payouts. If PBGC and the plan administrator (usually the employer) agree that an underfunded plan should be terminated as of a particular date, PBGC takes over administration of the plan's assets as trustee and begins paying the benefits

---

[2] As discussed in *Pan Am.*, 777 F.Supp at 1182, the "unreasonable increase" language now in § 1342(0) was "further increase" in the original version of ERISA. The change was made by § 402(a)(6)(D) of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364. However, this change was not mentioned either in the House Report on this legislation, H.B. Rep. No. 96-869, or in any of the floor debates. Two committee prints on the legislation merely reflect the changed language in § 1342(c) offering no analysis of the impact of the change or its rationale. Staff of Subcomm. on Labor-Management Relations of House Education and Labor Comm., Changes in Existing Law Made by the Bill H.R. 3900 49 (Comm. Print 1980); Staff of Sen. Comm. on Labor and Human Resources, S. 1076 The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 100, 246 (Comm. Print 1980).

defined by statute as of the termination date. If the plan administrator does not agree to a termination date PBGC proposes, then PBGC must obtain a judicial decree terminating the plan and establishing the termination date.

In *Heppenstall*, the court was required to determine what standards should govern a court's choice of a termination date under 29 U.S.C. § 1348(b)(2), The court approached this question by identifying the competing interests involved: PBGC's interest as an insurer in promptly terminating an underfunded plan in order to avoid additional losses to its insurance fund, and the plan participants' interest in receiving expected plan benefits. *Heppenstall*, 633 F.2d at 301-02. A similar approach is appropriate in defining the "unreasonable increase in liability" that requires termination of a plan under § 1342(c). This ground for termination balances the same interests that *Heppenstall*-PBGC's interest as insurer is advanced by terminating a plan if continued operation will likely deplete PBCG's insurance fund; the participants' interest in receiving expected benefits is advanced by not terminating a plan if such depletion is unlikely.

The likelihood of a depletion of PBGC's fund, then, is the touchstone, and it implies the consideration of both increased liability and likelihood of plan termination. First, even with a severely underfunded plan, continued operation may not lead to increased liability for PBGC. If the plan's own benefits are below the statutorily guaranteed levels and payouts under the plan are not increasing, continued operation of the plan will not increase PBGC's liability. Second, even if PBGC's liability does increase significantly, the increase will not lead to a loss to PBGC if the plan is be able to continue in operation successfully, through increased future contributions from the sponsor or otherwise. The increase in liability in this situation would not be "unreasonable."

The most plausible reading of the action Congress took in amending § 1342 (*see* n.2, *supra*) supports this interpretation.

By changing "further increase" to "unreasonable increase," Congress necessarily recognized the possibility that PBGC could be required to accept certain increases in liability arising from continued operation of underfunded plans. Given the interests of the parties involved, these "reasonable" increases would be those resulting from plans that can operate successfully.

ALPA's contrary argument-that any increase in liability is reasonable if it occurs in the ordinary course of a plan's operation, rather than as a result of some extraordinary event such as a plan amendment-simply ignores the interest of the PBGC that involuntary termination is intended to protected. ALPA's interpretation would allow a plan to continue indefinitely, exhausting its assets, while PBGC's liability for guaranteed payments increased, so long as no extraordinary event intervened. There is no basis for reading such an intent into the statute.

Application of the standard. When the two-part standard for an unreasonable increase in liability is applied to the facts in this case, it becomes apparent that PBGC has established cause for termination. First, the increase of $44 million that PBGC would incur if termination does not occur before January 1, 2005, is certainly a significant amount. Liability increases of much smaller amounts have been seen as grounds for termination, without argument. *See, e.g., Heppenstall*, 633 F.2d at 300 (noting termination based on an increase in liability of $3-4 million). Although this increase may not be large in relation to PBGC's overall liability for the Pilot Plan, that cannot be the appropriate standard when PBGC's interest in protecting its fund is considered. The impact of increased liability on PBGC's insurance fund is not changed by total liability a particular plan presents. To protect its fund, § 1342(c) allows PBGC to seek to avoid any significant increases in liability with respect to plans likely to fail.

Second, the only evidence bearing on the issue indicates that the Pilot Plan would not continue.[3] PBGC's administrative record reflected United's repeated statements in this case that termination of all of its defined benefit pension plans would be necessary for it to reorganize successfully, and United's agreements with ALPA and the PBGC contemplated such a termination. Accordingly, even though no witness testified on the subject, PBGC sustained its burden of establishing the likelihood of plan termination.

Conclusion

As discussed above, PBGC has shown that continued operation of the Pilot Plan beyond December 30, 2004 would result in an unreasonable increase in the liability of its fund, and so is entitled to a decree pursuant to 29 U.S.C. 1342(c) terminating the plan as of that date. The decree will be issued in a separate document.

Dated: October 26, 2005

/s/ Eugene R. Wedoff
Eugene R. Wedoff
United States Bankruptcy Judge

---

[3] URPBPA's expert advanced the theory that termination of the Pilot Plan was not necessary because an amended defined benefit plan could be successfully implemented. However, the expert acknowledged that United was not willing to pursue such an amendment, and so this alternative, even if theoretically possible, was unlikely to occur.

APPENDIX I

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Chapter 11
Case No. 02 B 48191
Adversary No. 05 A 00481

In re: UAL CORPORATION, *et al.*,
Debtors.

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff,

v.

UNITED AIR LINES, INC., AS PLAN ADMINISTRATOR FOR THE UNITED AIRLINES PILOT DEFINED BENEFIT PENSION PLAN,
Defendant,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, UNITED RETIRED PILOTS BENEFIT PROTECTION ASSOCIATION, ROGER D. HALL, DENNIS D. DILLON, GERARD TERSTIEGE, EUGENE M. CUMMINGS, RAYMOND P. FINK, JAMES M. KRASNO AND WILLIAM L. RUTHERFORD,
Intervenors.

AMENDED MEMORANDUM OF DECISION ON MOTION FOR SUMMARY JUDGMENT

This adversary proceeding, arising in the administratively consolidated Chapter 11 cases of United Air Lines, Inc. ("United") and its related entities, is before the court for ruling on the motion of the Pension Benefit Guaranty Cor-

poration ("PBGC") for summary judgment. The motion seeks an order (1) terminating the United Airlines Pilot Defined Benefit Pension Plan (the "Pilot Plan") and appointing PBGC as trustee of its assets; (2) establishing December 30, 2004, as the termination date of the Pilot Plan under 29 U.S.C. § 1348(a)(4); and (3) requiring United and all other persons who have possession, custody or control of all records, assets and property of the Pilot Plan to deliver them to PBGC. The third request is not in dispute: the parties acknowledge that if the Pilot Plan is terminated, the records, assets and property of the Pilot Plan must be turned over to PBGC as trustee. There is a dispute, however, regarding plan termination and the termination date.

As discussed below, PBGC is not entitled to summary judgment because there is a dispute with respect to plan termination. In the absence of an agreement with the plan administrator, PBGC must prove at trial, by a preponderance of the evidence, that the Pilot Plan must be terminated "in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or to avoid any unreasonable increase in the liability of the fund." 11 U.S.C. § 1342(c), However, if PBGC satisfies this burden of proof and the Pilot Plan is terminated, the December 30 termination date suggested by PBGC will be effective, because the undisputed facts demonstrate that participants of the Pilot Plan received adequate notice of termination on that date and that date serves the interests of PBGC.

Jurisdiction

Federal district courts have exclusive jurisdiction over bankruptcy cases. 28 U.S.C, § 1334(a). Pursuant to 28 U.S.C. § 157(a), district courts may refer bankruptcy cases to the bankruptcy judges for their district, and by Internal Operating Procedure 15(a) the District Court for the Northern District of Illinois has made such a reference of the pending cases. When

presiding over a referred case, the bankruptcy court has jurisdiction under 28 U.S.C. § 157(b)(1) to enter appropriate orders and judgments in core proceedings within the case. PBGC's adversary is a core proceeding under 28 U.S.C. § 157(b)(2)(A) (matters concerning estate administration). This court may therefore enter a final judgment. *In re Smith*, 848 F.2d 813, 816 (7th Cir. 1988).

Factual Background

The background facts relevant to the pending motion are not in dispute.[1]

On December 9, 2002, United and twenty-seven related corporations filed the voluntary Chapter 11 cases now before the court. (JPS at 22.) United is the plan administrator and contributing sponsor of the Pilot Plan under ERISA. (*Id.* at 21.) Approximately 15,000 active, retired and terminated United employees are participants in the Pilot Plan. (*Id.* at 22.) Before the end of 2004, United stated repeatedly, in court

---

[1] Citations are to the joint Pretrial Statement filed on March 16, 2005 [Docket No. 30] ("JPS"); PBGC's Motion for Summary judgment and attachments filed on June 6, 2005 [Docket No. 54], including the Statement of Undisputed Material Facts in Support of PBGC's Motion for Summary judgment ("PBGC's Statement of Undisputed Material Facts") and the the Declaration of Andrea Wong and attached exhibits ("Wong Decl."); United's Response to PBGC's Statement of Undisputed Material Facts in Support of PBGC's Motion for Summary Judgment and Statement of Additional Facts filed on July 15, 2005 [Docket No. 74] ("United's Response to PBGC's Undisputed Facts"); Response of ALPA to PBGC's Statement of Undisputed Material Facts filed on July 22, 2005 [Docket No. 91] ("ALPA's Response to PBGC's Undisputed Facts"); United Retired Pilots Benefit Protection Association and Certain Individual Retired Pilots' Response to Statement of Undisputed Material Facts in Support of PBGC's Motion for Summary judgment filed on July 15, 2005 [Docket No. 83] ("Retired Pilots' Response to PBGC's Undisputed Facts"); and PBGC's eight volume administrative record filed on March 28, 2005-volumes 1-3 [Docket No. 47] ("AR") and volumes 4-8 filed under seal [Docket No. 34] ("AR-S").

filings and in communications to the press and its employees, that it would likely need to terminate and replace all of its defined benefit pension plans in order to emerge successfully from bankruptcy. (*See id.* at 22.)

The Air Line Pilots Association, International ("ALPA") is the exclusive collective bargaining representative of United's pilots. ALPA entered into collective bargaining agreements with United that establish the terms and conditions of employment for United's pilots, including pension benefits provided under the Pilot Plan. (JPS at 21-22.) The United Retired Pilots Benefit Protection Association ("Retired Pilots") is an Illinois not-for-profit corporation created to protect the benefits of United's retired pilots. (*Id.* at 22.)

PBGC is a United States government corporation established under 29 U.S.C. § 1302(a) to administer the insurance program for defined benefit pension plans created under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1301-1461. (JPS at 21.) PBGC guarantees certain benefits under pension plans covered by ERISA and has authority, under circumstances defined by ERISA, to terminate underfunded pension plans. (*Id.* at 23-24; *see* 29 U.S.C. § 1342.) PBGC has established an administrative process, involving its Trustee Working Group ("TWC"), to determine whether and when a pension plan should be terminated. (*See* Wong Decl., Ex. 1. (PBGC Directive issued on May 8, 2001).)[2]

On December 17, 2004, United filed a motion seeking approval of a tentative agreement with ALPA providing for

---

[2] TWC is an interdisciplinary body, comprised of representatives from PBGC's financial, actuarial, policy and legal offices, that makes recommendations for plan termination based on staff reports. (Wong Decl. Ex. 1 at § 3.) In cases involving claims of $100 million or more, the Executive Director of PBGC determines whether to proceed with a termination recommended by TWC. (*Id.* at § 2b(4), 3.) The Executive Director also determines the termination date that should be proposed to the plan administrator. (*Id.*)

substantial modifications to their collective bargaining agreement. In the agreement, ALPA promised not to oppose termination of the Pilot Plan by United, and United promised not to seek plan termination, and to oppose any attempt by PBGC to terminate the plan, before May 2005.[3]

On December 23, 2004, PBGC staff forwarded a memorandum to the chairman of the TWG recommending termination of the Pilot Plan with a termination date as soon as practicable but in no event later than December 30, 2004. (PBGC's Statement of Undisputed Material Facts at ¶15; AR at 14-23.) On December 27, 2004, the TWG met and voted to concur with this recommendation. (*Id.* at ¶16; AR at 11-13.) On December 27, 2004, TWG's recommendation, with supporting materials, was transmitted to PBGC's Executive Director. (*Id.* at ¶17; AR at 7.) On December 29, 2004, the Executive Director issued a Notice of Determination, which provided as follows:

> [T]he Pension Benefit Guaranty Corporation ("PBGC") has determined, under section 4042(a)(4) of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), 29 U.S.C. § 1342(a)(4), that the United Airlines Pilot Defined Benefit Pension Plan

---

[3] *See* United's Motion to Approve Letter of Agreement Modifying Their Collective Bargaining Agreement with ALPA filed on December 17, 2004 [Docket No. 93651. United's motion to approve the December Letter of Agreement was denied, but a revised agreement was approved on January 31, 2005. *See* Order Denying Motion to Approve entered on January 7, 2005 [Docket No. 9697]; United's Motion to Approve Agreements Modifying Collective Bargaining Agreements filed on January 19, 2005 [Docket No. 9772]; Order Granting Motion to Approve entered on January 31, 2005 [Docket No. 9933]. The revised agreement continued to provide for ALPA's waiver of opposition to termination after May 11, 2005. In the revised agreement, United promised not to seek plan termination and to oppose PBGC-initiated termination at any time before the earlier of ten days before exiting bankruptcy or termination of United's other defined benefit pension plans.

> ("Plan") must he terminated because the possible long-run loss of the corporation with respect to the Plan may reasonably be expected to increase unreasonably if the Plan is not terminated. PBGC further determined, under ERISA § 4042(c), 29 U.S.C. § 1342(c), that the Plan must be terminated in order to avoid any unreasonable increase in the liability of the fund. Accordingly, PBGC intends to proceed under ERISA § 4042, 29 U.S.C. § 1342, to have the Plan terminated and PBGC appointed as statutory trustee, and under ERISA § 4048, 29 U.S.C. § 1348, to have December 30, 2004, established as the Plan's termination date.

(*Id.* at ¶33; AR at 1.)[4]

On December 29, 2004, PBGC sent to United and ALPA via overnight mail a copy of the Notice of Determination, which ALPA received on December 30, 2004. (PBGC's Statement of Undisputed Material Facts at ¶34-37; Wong Decl., Ex. 2.)[5] On December 30, 2004, the Notice of

---

[4] PBGC has determined that if the Pilot Plan continued until June 2005, it would have to absorb as much as $138 million of additional liability. (PBGC's Statement of Undisputed Material Facts at ¶20) United, ALPA and the Retired Pilots dispute PBGC's determination regarding its possible long-run loss in relation to the Pilot Plan. (United's Response to PBGC's Undisputed Facts at ¶20; ALPA's Response to PBGC's Undisputed Facts at ¶20; Retired Pilots' Response to PBGC's Undisputed Facts at ¶20.)

[5] United has objected to the facts asserted by PBGC regarding notice, but only on the ground that these facts are not included in the administrative record. (United's Response to PBGC's Undisputed Facts at ¶¶34-37) Because, as discussed below, PBGC is required to prove its case-and not merely to defend against claims that its decision-making was arbitrary—PBGC is not limited to facts set out in its administrative record. ALPA and the Retired Pilots admit these facts, but object on the ground that PBGC's arguments regarding notice exceed the "limited scope of the summary judgment motion this Court permitted PBGC to file before the close of discovery." (ALPA's Response to PBGC's Undisputed Facts at

Determination was published nationally in USA Today and a variety of major newspapers serving metropolitan areas where United's hubs are located, including The Chicago Tribune, The Washington Post, The Los Angeles Times, The San Francisco Chronicle, The Denver Post, and The Rocky Mountain News. (PBGC's Statement of Undisputed Material Facts at ¶38; Wong Decl., Ex. 3.) In addition, on December 30, 2004, PBGC, United and ALPA all published press releases on their websites announcing PBGC's decision to seek termination of the Pilot Plan. (PBGC's Statement of Undisputed Material Facts at 38; Wong Decl., Exs. 4, 5, 6.)[6] On December 30, 2004, PBGC filed a complaint in the United States District Court for the Northern District of Illinois seeking termination of the Pilot Plan. (*See* Complaint (Case No. 04-cv-0838 [Docket No. 1]) at ¶1.) The district court granted motions by ALPA and the Retired Pilots to intervene under Fed. R. Civ. P, 24 and also granted United's emergency motion to confirm automatic referral to the bankruptcy court pursuant to Internal Operating Procedure 15(a). (Case No. 04-cv-08338 [Docket Nos. 9, 12, 22, 23].) The case was transferred to this court on February 1, 2005, creating the pending adversary. (*Id.* [Docket No. 27].) On March 28, 2005, PBGC filed the administrative record sup-

---

¶34-37; Retired Pilots' Response to PBGC's Undisputed Facts at ¶34-37.) Both objections are addressed in the Conclusions of Law. *See infra*, n. 7.

[6] ALPA indicates that it "lacks knowledge sufficient to either admit or deny the allegations of paragraph 38." (ALPA's Response to PBGC's Undisputed Facts at ¶38.) Because ALPA's response does not controvert the facts set forth in paragraph 38, the facts are deemed admitted pursuant to Local Rule 7056-2B. The Retired Pilots deny paragraph 38 as not being supported by reference to the record because Exhibit 4 to the Wong declaration does not contain the mentioned publications and Exhibit 5 does not contain a PBGC press release. (Retired Pilots' Response to PBGC's Undisputed Facts at ¶38.) However, Exhibits 3 and 4 to the Wong declaration do contain the newspaper publications as well as PBGC's press release, and the apparent error in PBGC's Statement of Undisputed Material Facts does not undermine the facts asserted.

porting its decision to seek involuntary termination of the Pilot Plan. (AR; AR-S.)

On May 11, 2005, this court approved a settlement between United and PBGC that provided for an agreed termination of the Pilot Plan "with a termination date that is either mutually agreed by [United and PBGC] or judicially determined," but nothing in the settlement limited PBGC's right to seek its proposed plan termination date of December 30, 2004, nor did the settlement require United to act in a manner inconsistent with the revised agreement with ALPA, under which it was obligated to oppose a termination date before that of United's other defined benefit pension plans. (Order Granting United's Motion to Approve Agreement with PBGC entered on May 11, 2005 [Docket No. 1.1229], Ex. A, ¶4.)

Conclusions of Law

A. Summary judgment Standards

A motion for summary judgment may be granted if the movant demonstrates through admissible evidence that no genuine issue of material fact exists for trial and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c), incorporated by reference in Fed. R. Bankr. Proc. 7056(c).[7] The initial—and dispositive—issue raised by the present summary judgment motion is whether under 29

[7] The Retired Pilots argue that insofar as PBGC's motion seeks to establish a termination date it requests relief beyond the scope of the motion that the court directed PBGC to submit. ALPA poses a similar objection. (*See* ALPA's Response to PBGC's Undisputed Facts at 2.) Under Fed. R. Civ. P. 56, "[a] party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor *upon all or any part thereof*." *Id.* (emphasis supplied). PBGC's motion for summary judgment is appropriate because it seeks relief contained in its Complaint. (*See* Complaint at 11.)

U.S.C. § 1342(c) a court may issue a decree terminating a pension plan if parties opposing termination fail to establish that PBGC acted arbitrarily in seeking termination, or whether PBGC must affirmatively establish grounds for termination. If PBGC must prove its case, summary judgment could not be granted, because the grounds for plan termination here are in dispute.

As discussed below, summary judgement must be denied because § 1342(c) requires a judicial determination that the Pilot Plan must be terminated-a question on which PBGC bears the burden of proof-not simply judicial review of the reasonableness of PBGC's decision to seek termination. On the other hand, there is no factual dispute regarding notice to plan participants. PBGC gave effective notice of plan termination on December 30, 2004, and is entitled to an order making that finding. If, at trial, PBGC establishes grounds for termination as of December 30, 2004, the plan will be terminated as of that date.

B. The Standard of Review under 29 U.S.C. § 1342(c)

Title IV of ERISA provides the exclusive means for terminating a defined benefit pension plan regulated by the statute. 29 U.S.C. § 1341(a)(1). Section 1342(a) gives PBGC the authority to institute proceedings to terminate a plan if PBGC determines that any of four listed grounds exist. 29 U.S.C. § 1342(a)(1)-(4). One of the grounds in § 1342(a)-the one on which PBGC relies here is that "the possible long-run loss of [PBGC] with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated." 29 U.S.C. § 1342(a)(4).

Under § 1342(c), if PBGC and the plan administrator agree that a plan should be terminated and a trustee appointed, then termination may occur without court adjudication.[8] When

[8] Section 1342(c) provides in pertinent part as follows:

there is such an agreement, termination occurs by way of PBGC's informal agency action, which, if challenged, is subject to judicial review under the arbitrary and capricious standard of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.[9]

> If the corporation [PBGC] is required under subsection (a) of this section to commence proceedings under this section with respect to a plan or, after issuing a notice under this section to a plan administrator, has determined that the plan should he terminated, it may, upon notice to the plan administrator, apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund . . . Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under subsection (b) of this section (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan in accordance with the provisions of this subtitle. If the corporation and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee without proceeding in accordance with the requirements of this subsection (other than this sentence) the trustee shall have the power described in subsection (d)(1) of this section and, in addition to any other duties imposed on the trustee under law or by agreement between the corporation and the plan administrator, the trustee is subject to the duties described in subsection (d)(3) of this section. . .

29 U.S.C. § 1342(c); *see Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197, 199 (2d Cir. 1987) ("On its face [the fourth sentence of subsection 1342(c)] permits PBGC and the administrator . . . to proceed in a summary fashion without affording plan members pretermination notice and hearings to contest the propriety of the termination decision.") Additionally, 1342(b) (3) authorizes PBGC and the plan administrator to agree upon appointment of PBGC as trustee without instituting a court proceeding. ("[PBGC] and plan administrator may agree to the appointment of a trustee without proceeding in accordance with the requirements of paragraphs (1) and (2).") Otherwise, PBGC may apply to the court for the appointment of a trustee pending a decree terminating the plan pursuant to § 1342(c). 29 U.S.C. 1:342(b)(1).

[9] "Informal" action is a residual category including all agency actions that are not rulemaking and that need not be conducted through on the

However, and of critical importance here, if the plan administrator does not to agree to termination of the plan, PBGC must, as it did in this case, "apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated." 29 U.S.C. § 1342(c). In this context, 1342(c) requires a *de novo* determination of the appropriateness of plan termination, not mere deferential review under the APA of PBGC's determination to proceed.

• First, § 1342(a) provides that with respect to "small plans" PBGC may prescribe a simplified procedure for termination "as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c) of this section)." 29 U.S.C. § 1342(a). Thus, the statute itself requires that the court decree serve as a "substantial safeguard" for the rights of parties other than PBGC affected by plan termination; deferential review of agency decision-making is inconsistent with this requirement.

• Second, the grounds for termination required to support a judicial decree under § 1342(c) are significantly different from those that PBGC must find to initiate termination proceedings under § 1342(a).[10] PBGC may decide to initiate

---

record hearings. *See City of West Chicago v. NRC*, 701 F.2d 632, 644 (7th Cir. 1983). Section 706 of the APA instructs the court to set aside "agency action" in all cases if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" or if the action fails to meet statutory, procedural or constitutional requirements. 5 U.S.C. § 706. When termination occurs through informal action, the court accordingly reviews PBGC's decision under the arbitrary and capricious standard. *See PBGC. v. LTV*, 496 U.S. 633, 655 (1990) (reviewing PBGC's informal action restoring a terminated pension plan pursuant to 29 U.S.C. § 1347).

[10] Section 1342(a) provides in pertinent part that PBGC may institute proceedings to terminate a plan whenever it determines that:

> (1) the plan has not met the minimum funding standard required under section 4.12 of Title 26, or has been notified by the Secretary

termination proceedings under § 1342(a) without addressing the grounds needed for a judicial decree effecting a termination under § 1342(c). For example, under § 1342(a)(1), PBGC may initiate termination proceedings simply because a plan is underfunded, but if the underfunding is only temporary, it would not necessarily establish any of the grounds for termination under § 1342(c).[11] Thus, a judicial decree under § 1342(c) must be based on more than a determination that PBGC did not act arbitrarily in initiating the proceeding.

• Finally, § 1342(c) states that the court decree itself is to "adjudicate" whether termination is necessary under one of the specified grounds, not merely to review a determination previously made by PBGC. *See Black's Law Dictionary*

---

of the Treasury that a notice of deficiency under section 621.2 of Title 26 has been mailed with respect to the tax imposed under section 4971(a) of Title 26,

(2) the plan will be unable to pay benefits when due,

(3) the reportable event described in section 1343(c)(7) of this title has occurred, or

(4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

29 U.S.C. § 1342(a), Section 1342(c), by contrast, requires a judicial decree of termination to be based on a need "[1] to protect the, interests of the participants, [2] to avoid any unreasonable deterioration of the financial condition of the plan or [3] to avoid any unreasonable increase in the liability of the fund."

[11] The statutory structure appears to address precisely this situation. If the plan administrator believes that an underfunded plan cannot survive, and so accepts a PBGC determination under § 1342(a) that the plan should be terminated, termination becomes effective without judicial involvement. But if the administrator believes that an underfunded plan is still viable and declines to accept PBGC's decision to terminate, the employer is entitled to a judicial proceeding at which PBGC must establish the necessity for termination under § 1342(c).

(8th ed. West 2004) ('adjudicate" means "to rule upon judicially").

The legislative history of ERISA confirms that *de novo* judicial determination was an intentional feature of the law. Under the original version of the House bill, unless the plan administrator requested termination, the Secretary of Labor was authorized to terminate a plan only after an administrative hearing establishing grounds for termination. *See* H.R. Conf. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5151. The bill was ultimately referred to a conference committee that removed the requirement for an administrative hearing but introduced the current requirement for court adjudication. *Id.* at 5152. Thus, a formal hearing on plan termination was always required if the administrator did not consent; the court was simply given the role of adjudicator originally assigned to the agency.

PBGC's argument for deferential judicial review here resembles the argument it made in *PBGC v. Heppenstall Co.*, 633 F.2d 293 (3d Cir. 1980). In *Heppenstall*, PBGC insisted that the court should defer to PBGC in determining a plan's termination date under § 1348.[12] The court rejected that deferential approach on the ground that "the statutory scheme relegates resolution of disputes over termination to the courts in the first instance, not to PBGC." *Id.* at 301. Concerned about PBGC's obvious interest in protecting the solvency of the pension insurance program, the court said: "Congress determined that in the absence of agreement between PBGC and a plan administrator the court would protect participants from overly cautious use of the involuntary termination feature of the insurance scheme." *Id.* The analysis in *Heppenstall* is fully applicable here.

---

[12] Section 1384 provides that in the absence of an agreement between the plan administrator and PBGC, the termination date of a plan is "the date established by the court." 29 U.S.C. § 1384(a)(4). At the time the *Heppenstall* opinion was issued, this language was found at § 1384(2).

PBGC's cites three decision to support deferential review of its termination decision, but none is persuasive.

The first, *In re Pan American World Airways, Inc. Cooperative Bet. Inc. Plan*, 777 F. Supp. 1179, 1181 (S.D.N.Y. 1991), held that de novo judicial determination was unwarranted because "[t]here is nothing in the applicable ERISA provisions to show that the [judicial review provisions] of the Administrative Procedures Act . . . should not apply to this decision by PBGC." 777 F. Supp. at 1181. The court reasoned that "[t]o find a contrary intent in the statute would be to depart from the usually applicable deference to the expertise of an administrative agency, particularly when the agency has made an adjudicative decision within its sphere of responsibility." *Id.* at 1181.-82.[13] As discussed above, however, § 1342(c) removes contested plan termination from PBGC's sphere of responsibility. In the absence of consent from the plan administrator, PBGC is required to obtain a judicial decree; it cannot engage in informal agency action subject merely to deferential judicial review.

In *PBGC v. FEL Corp.*, 798 F. Supp. 239, 241 (D. N.J. 1992), the court applied the APA's arbitrary and capricious standard rather than holding a de novo hearing, based principally on the Supreme Court's decision in LTV, 496 U.S. 633. But LTV involved PBGC's decision to restore a terminated pension plan under 29 U.S.C. § 1347, a statute significantly different from § 1342.[14] Unlike § 1342, § 1347 does not

---

[13] Under the APA, "[t]he reviewing court is not empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

[14] Section 1347 provides as follows:

> Whenever the corporation [PBGC] determines that a plan which is to be terminated under section 1341 or 1342 of this title, or which is in the process of being terminated under section 1341 or 1342 of this title, should not be terminated under section 1341 or 1342 of

require PBGC to apply to the court for a decree adjudicating that a plan must be restored when the plan administrator disagrees with PBGC's decision. Although enforcement of PBGC's decision to restore a pension plan pursuant to § 1347 may require the assistance of a court, the restoration is accomplished, with or without the agreement of the plan administrator, solely on account of PBGC's informal agency action. Thus, *LTV's* application of the arbitrary and capricious standard to PBGC decision-making under § 1347 has no bearing on court adjudications under § 1342.

The third decision, *PBGC v. Haberbush*, No. CV0002631 GHKAIJX, 2000 WL 33362003 (C.D. Cal. Nov. 3, 2000), applied the APA's arbitrary and capricious standard because PBGC's determination to terminate a pension plan pursuant to § 1342 was "final agency action." *Id.* at 5. The *Haberbush* court also relied on LTV, reasoning that "the Supreme Court has held that the APA's arbitrary and capricious standard of review applies to a determination of the PBGC governed by the same set of statutory provisions at issue in this case'" *Id.* at 6. However, PBGC's decision under § 1342(a) is only final agency action when the plan administrator waives § 1342's

---

this title as a result of such circumstances as the corporation determines to be relevant, the corporation is authorized to cease any activities undertaken to terminate the plan, and to take whatever action is necessary and within its power to restore the plan to its status prior to the determination that the plan was to be terminated under section 1341 or 1342 of this title. In the case of a plan which has been terminated under section 1341 or 1342 of this title the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to restore the plan to its pretermination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.

29 U.S.C. § 1347.

requirement for a court decree, and, as noted above, LTV is not relevant here.

Because the court must determine whether grounds for termination under § 1342(c) exist, and because there are factual disputes over whether termination of the Pilot Plan is appropriate under those standards, *see supra*, n. 4, a trial on that question is necessary. As any plaintiff in typical civil litigation, PBGC will have the burden of proof at trial under a preponderance of the evidence standard. *See Grogan v. Garner*, 498 U.S. 279, 286 (1991) (in the absence of a statutory standard, the preponderance of the evidence standard is presumed to apply in civil actions unless particularly important individual interests or rights are at stake).[15]

C. PBGC's proposed December 30, 2004 termination date

If PBGC proves that the Pilot Plan must be terminated, it will be necessary to consider whether the notice it provided was sufficient to establish a termination date of December 30, 2004. Where, as here, PBGC and the plan administrator do not agree upon a termination date, the court must set one. 29 U.S.C. § 1348(a)(3), (4). Courts use a two-step process for establishing a termination date, taking into account (1) "the expectations of the plan participants" and (2) "the financial implications of the termination for PBGC" *See PBGC v. Republic Techs. Int'l., LLC*, 386 F.3d 659, 665 (6th Cir. 2004) (collecting authorities). In that process, courts first determine the earliest date by which the plan participants had

---

[15] The APA, as it applies to formal administrative hearings, places the burden of proof on the proponent of a rule or order. 5 U.S.C. § 556(d) ("[e]xcept as otherwise provided by statute, the proponent of a rule: or order has the burden of proof."). Thus, if PBGC had been required to provide a formal agency hearing, its staff would have had the burden of proof with respect to plan termination. The fact that Congress provided for court adjudication under § 1342(c) as an alternative to a formal agency hearing further supports placing the burden of proof on PBGC as the proponent of the order adjudicating that the Pilot Plan must be terminated.

actual or constructive notice of termination, since such actual or constructive notice is seen as effective to extinguish reliance interests. *See Republic Techs.*, 386 F.3d at 666; *PBGC v. Broadway Maint. Corp.* (*In re Pension Plan for Employees of Broadway Maint. Corp.*), 707 F.2d 647, 652-53 (2d Cir. 1983); *see also Eckstein v. Balcor Film Investors*, 58 F.3d 1162, 1168 (7th Cir.1995) (defining constructive notice as "not actual knowledge, but the ability to acquire knowledge by reasonably diligent inquiry"). Courts then select that date unless a later one better serves the interests of PBGC. *See Republic Techs.*, 386 F.3d at 667-68.

Rule 56(d) allows a court to narrow the issues for trial by determining facts not in controversy even when summary judgment cannot be granted. Fed. R. Civ. P. 56(d), incorporated by reference in Fed. R. Bankr. P. 56. *See Doctors Hosp. v. Desnick* (*In re Doctors Hosp.*), Adversary No. 02 A 00363 (Bank. No. 00 B 11520), 2005 WL 2347899 (Bankr. N.D. Ill. Sept. 22, 2005); *Carillo v. Bridgestone/Firestone, Inc.*, No. IP 00-9373-C-B/S, IP 00-5005-C-B/S, 2002 WL 1011781 at *1 (S.D. Ind. May 13, 2002); *First Nat'l Ins. Co. v. F.D.I.C.*, 997 F. Supp. 1051, 1055 (S.D. Cal. 1997). Because there are no genuine issues of fact for trial, an order pursuant to Rule 56(d) is appropriate here to establish a termination date.

The undisputed facts demonstrate that the participants of the Pilot Plan received notice sufficient to extinguish any justifiable expectation that the plan would continue. The Notice of Determination was sent by PBGC on December 29, 2004, and received by ALPA the next day, December 30, 2004. Also, on December 30, 2004, the Notice of Determination was published in newspapers throughout the country. In addition, PBGC, United and ALPA, published press releases announcing PBGC's decision to seek termination of the Pilot Plan.

United argues that the reasonable expectations of the plan participants weighed so heavily against PBGC's proposed

termination date that their expectations should override the impact of notice. However, that is not the applicable standard. *See* Republic Techs., 386 F.3d at 666 (reversing a ruling that "PBGC's notice to the participants did not presumptively terminate the participants' reliance interests" and noting that "[e]very court to consider the issue has concluded that expectation interests in the accrual of benefits are extinguished on the date the participants receive reasonable notice from PBGC that the plan is going to be terminated"). The Pilot Plan participants' expectation interests were extinguished on December 30, 2004, when they received reasonable notice from PBGC that it was seeking termination of the Pilot Plan. Moreover, PBGC was not required, as ALPA suggests, to provide individualized notice to each of the approximately 15,000 participants of the Pilot Plan.

To answer the second question—what date serves the interests of PBGC—the court need look no farther than PBGC's proposed date. *See PBGC v. Mize Co., Inc.*, 987 F.2d 1059, 1063 (4th Cir.1993) ("PBCC's interests should be deemed to be best served by the date proposed by PBGC.") There is no question that PBGC is better served by the December 30 date than some later date, and so the requirements for an effective notice on tht date have been satisfied.

Conclusion

For the reasons stated above, the question of whether plan termination is appropriate must be adjudicated at trial but PBGC is entitled to an order establishing that its notice of December 30, 2004 termination date was effective. A separate order has been entered consistent with this decision.

Dated: October 26, 2005

/s/ Eugene R. Wedoff
Eugene R. Wedoff
United States Bankruptcy Judge

APPENDIX J

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 B 48191
No. 05 A 00481

In re: UAL CORPORATION, *et al.*,
Debtors.

PENSION BENEFIT GUARANTY CORP.,
Plaintiff,

vs.

UNITED AIRLINES, INC.,
Defendant.

Chicago, Illinois
September 21, 2005
9:30 a.m.

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE EUGENE R. WEDOFF

APPEARANCES:

MS. BABETTE CECCOTTI
MR. THOMAS CIANTRA
on behalf of the Air Line Pilots;

MR. JACK CARRIGLIO
MR. ERIC NEWMAN
MR. FRANK CUMMINGS
on behalf of the United Retired Pilots Benefit Protection Association and the individual intervenors;

MS. KATY JAKOLA
on behalf of the debtors;

MS. NANCY HEERMANS
MS. PAULA CONNELLY
MS. SHANNON NOVEY
on behalf of Pension Benefit Guaranty Corporation.

* * * *

[7] THE COURT: Now, the final motion in limine that I need to address—final pre-trial motion that I need to address is the question of reopening the issue of the effectiveness of the notice that was given by PBGC. And on that point I want to make a distinction.

In order to obtain a decree of termination, PBGC needs to establish, as I've found earlier, that there was a reasonable prospect of an unreasonable loss for PBGC should the plan continue. That determination has to have been appropriate as of the date notice was given. And so to that extent, the notice date is extraordinarily relevant. And obviously we'll be hearing evidence about the condition of the pilots' plan as of the December 2004 date. But we are not going to revisit the question of whether the notice that was actually given as of that date was effective. And the major [8] reason for doing that—well, first, a question of judicial economy, I've already

ruled on it. But also there would be prejudice here. As PBGC pointed out in its response on this issue, I announced in open court that the reason for giving a summary judgment ruling on a partial basis prior to the trial was to allow the parties to use the limited resources and time that they had available for the issues that I believed really were in dispute.

So although certainly the issue is preserved for appeal in the event that I find that termination is appropriate, I won't be hearing evidence or further argument on the question of whether the notice that was given was actually effective. I take that to be a legal question that I've already ruled on and we'll proceed to the issues that I believe are in dispute.

Now, as far as the summary judgment ruling, I do have what I believe is a final draft that I want to read one more time. I'll do that over lunch, and I will have that for you at the beginning of the afternoon. But it will be completely consistent with the ruling that I announced in court.

* * * *

APPENDIX K

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

February 23, 2006

Before: Hon. John W. Darrah

No. 05-C-6220

IN THE MATTER OF:
IN RE: UNITED AIR LINES

Order

On February 2, 2006, this Court, in a Memorandum Opinion and Order in case number 05-C-6955, reversed the Bankruptcy Court's October 26, 2005 order terminating the United Air Lines Pilot Defined Benefit Pension Plan. Appellant claims the termination of the plan as a basis for this appeal. United's appeal of the October 6, 2005 order is, therefore, dismissed for lack of ripeness.

/s/ John W. Darrah
JOHN W. DARRAH

Date: 2/23/06

APPENDIX L

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

October 6, 2005

Before: Hon. Eugene R. Wedoff

No. 02-B-48191

IN THE MATTER OF:
IN RE: UAL CORPORATION, *et al.*

Motion of ALPA and URPBPA to Compel Payments of Non-Qualified Benefits and Continued Processing of Pension Applications #12980

Order

For the reasons stated in open court, the motion is granted and the effective date of this order will be October 7, 2005 at 5:00 p.m.

/s/ Eugene R. Wedoff
EUGENE R. WEDOFF

Date: Oct. 6, 2005

Docket No. 13019

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

October 6, 2005

Before: Hon. Eugene R. Wedoff

No. 02-B-48191

IN RE: UAL CORPORATION, *et al.*,
Debtors.

Chicago, Illinois
October 6, 2005
9:30 a.m.

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE EUGENE R. WEDOFF

APPEARANCES:

MR. DAVID SELIGMAN
on behalf of the debtors;

MR. JACK CARRIGLIO
on behalf of URPBPA;

MS. BABETTE CECCOTTI
appearing telephonically on behalf of ALPA;

* * * *

[2] THE CLERK: UAL Corporation, 02 B 48191, emergency motion of ALPA.

MR. CARRIGLIO: Good morning, Your Honor. Jack Carriglio on behalf of the Retired Pilots.

MR. SELIGMAN: Good morning, Your Honor. David Seligman on behalf of the debtors.

THE COURT: Is there an appearance by telephone?

MS. CECCOTTI: Yes. Good morning, Your Honor. Babette Ceccotti for the Air Line Pilots Association.

THE COURT: Mr. Carriglio, this is effectively a motion for a mandatory injunction.

MR. CARRIGLIO: I believe, Your Honor, it's a motion based on Your Honor's prior ruling.

THE COURT: It is a motion for a mandatory injunction. You want me to order United Airlines to make payments to your clients, right?

MR. CARRIGLIO: It's a joint motion, and it is similar to the last motion to compel that was done by ALPA under 1113 to enforce the agreement that was reached as of January 2005. So it is styled, I believe, Judge, the same as the last motion under 1113 that you granted.

[3] THE COURT: Mr. Seligman.

MR. SELIGMAN: I would just like to make two points quickly. Obviously, we've stated our position before. But the first point is, Your Honor, again, this is a bankruptcy case. It is about doing equity. It is about treating similar creditors similarly. And that's our job. United is a fiduciary of this estate.

Your Honor has indicated your ruling. Yes, you haven't entered an order yet, but we believe at this point the claims of the pilots for these nonqualified benefits will be unsecured claims. And to force us to make this payment would treat them in a position superior to other similarly-situated creditors.

This litigation has been pending since December 30th. If by fortune the matter had been ruled on in January, let's say,

with a December 30th effective date, we would not have had to pay so far the $54 million that we have paid. And I think this time the day of reckoning has come. And, again, just because you haven't—

THE COURT: What's the argument against the application of Section 1113 here?

MR. SELIGMAN: What I would say with [4] respect to that is, if Your Honor recalls your ruling with respect to the independent fiduciaries' motion to compel United to make the minimum funding contributions, which was also a motion to force us to comply with alleged CBA obligations or 1113(f), what Your Honor ruled there was that 1113(f) does not create any superpriority; all it does is have a contractual obligation.

Whatever rights to payment in terms of priority or timing are left to other provisions of the code, whether it be 507 or 503. And so I don't believe the fact that this is a motion for enforcement of 1113 obligates us to make the payment now.

Your Honor can enter your order. And if Your Honor does in fact do what Your Honor indicated you were going to do, then we can address this at another time. But that's the ruling that Your Honor made with respect to the minimum funding contributions and alleged 1113 obligation. And I don't think that the court should take a different view now.

MS. CECCOTTI: Your Honor, if I might just quickly, for the Air Line Pilots Association. We also think that this is a motion very much akin to [5] the motion that we brought in February. And on that basis, I would distinguish the order that Mr. Seligman has just referenced.

THE COURT: Yes. The basis for that ruling was that this effectively is a request to enforce a postpetition agreement that the debtor entered into, settlement agreement that the debtor entered into, that required the payment of these funds to the retirees pending termination of the underlying pension plan.

MR. SELIGMAN: Well, I would say, Your Honor, whether it is—the concept of 1113 doesn't distinguish between prepetition or postpetition agreements. So whether it is a pre or postpetition agreement—postpetition agreement, that shouldn't make a difference. If it's an obligation under 1113, apparently, then the priorities of payment can't be altered from what they would otherwise be under 503 or 507.

MS. CECCOTTI: Your Honor, again—

THE COURT: Excuse me, Ms. Ceccotti. What distinguishes this from the situation that I ruled on earlier? Only the fact that I've announced orally a ruling on the termination of the pension plan?

[6] MR. SELIGMAN: Yes.

THE COURT: If you thought I was wrong in February or whenever I ruled on this issue, the same issue when it came up before, Mr. Seligman, I think it would have been appropriate to take some kind of appeal then, and maybe your position as a legal matter would have prevailed; the argument being that there is no reason to require payment here; that this is simply an unsecured claim that ought to be treated like any other unsecured claim, accorded whatever priority the code establishes for it, but not given any kind of superpriority by virtue of an order of immediate payment. But you didn't take any appeal then.

MR. SELIGMAN: Your Honor, I don't think the fact that we didn't take an appeal—if Your Honor ruled against us, I don't think that we should—I don't think that we should be additionally prejudiced because we happened to determine not to take an appeal.

THE COURT: No, but the reason I say that is that that is in a sense law of the case. I am being asked to simply apply the same ruling that I applied then. And you're basically making the same argument you made then.

[7] MR. SELIGMAN: Well, you're right, Your Honor. But again, the distinguishing feature is that Your Honor has indicated—Your Honor made a ruling. You haven't entered an order. And I just think that as a matter of equity in this case and treating people similarly, I don't think it is appropriate just because Your Honor wants to take the time to enter a well-reasoned opinion that the estate should have to pay additional money to one group that's going to result in them getting preferred over somebody else, especially given the fact that this was set as a termination date. Your Honor ruled December 30th. And they've gotten paid $54 million more than they would have otherwise gotten paid had the matter been determined at that time.

THE COURT: I understand completely the, I almost want to say, emotional impact of the argument that you're making. At a kind of gut level, fairness level, it makes a great deal of sense. But as a matter of law, I don't see anything that distinguishes this situation from the situation that I ruled on earlier.

And as a matter of law, the argument you're making now is that same argument that you made before. I don't think it is a matter that is [8] entrusted to some kind of broad discretion of the court. There is either the obligation to make this payment or not.

I ruled previously that there was an obligation to make the payment. That ruling was not appealed. It remains, I believe, law of the case. It is the same situation with the same parties. The intervening hearing and oral preliminary determination that I announced in court really doesn't change the underlying legal situation.

MR. SELIGMAN: Your Honor, if I could make one—I'll give you another legal point that perhaps you can take into consideration.

The motion that was brought in February was a motion brought by both ALPA and the retired pilots to enforce an obligation, a contract between United and ALPA. The retired pilots were not part of that agreement. In fact, that very agreement was objected to and is still appealed by the retired pilots.

It was an argument. If Your Honor recalls, Ms. Ceccotti stood up here and made her argument and Your Honor accepted her argument. But that was a contract between United and ALPA for ALPA's benefits. And Your Honor ruled that we had an [9] obligation to make the payment. I would submit that if Your Honor is going to take a look at that contractual obligation and look at it as a postpetition contract, it is a contract between United and ALPA. And then let's look at what are the obligations that perhaps United has to ALPA under this agreement.

The obligation running to ALPA is with respect to—if you look at ALPA's motion, it talks—in its joint motion, it talks about that we owe some lump sum obligation payments to retiring pilots, retiring pilots who are still represented by ALPA because they are active employees. That's one issue.

The second issue is the issue of making nonqualified payments to retired pilots who are not represented by ALPA. And, as a matter of fact, ALPA throughout this case has stated that they don't represent the retired pilots. In 1114 they stated that they didn't represent the pilots. So it's a question of who represents the retired pilots. URPBPA in this case. That agreement between United and ALPA was not negotiated with URPBPA. It didn't involve URPBPA. URPBPA actually contested that agreement.

[10] And so we believe, Your Honor, if you were going to enforce that as a contractual matter, you should enforce the contractual obligations between United and ALPA for the benefit of the active retiring pilots to pay the lump payments,

which I don't know the exact amounts, several hundred thousand. But the moment that they retire and they are out the door, they are no longer represented by ALPA and they shouldn't get the benefit.

As a matter of fact, and there's been—and Your Honor ruled in the 1113 process, URPBPA couldn't participate in the 1113 process because they weren't a party to the CBA, and they had no rights under the CBA. So I think if Your Honor was going to make a distinction there, that would be the distinction and you should separate out the obligations to the active pilots versus the retired pilots.

THE COURT: Do you have anything to say in response to that?

MS. CECCOTTI: Yes, I do, Judge. I think that if Your Honor reviews the ruling from February, you will see that this was a matter of reading the language of Section 4 of the agreement, which is the language that is quoted in today's joint [11] motion. The language does not distinguish between the effect of the "shall not terminate" —the A plan language.

This not a representation question. There is no inconsistency really between ALPA's motion—it was ALPA's motion in February, I believe. URPBPA supported—may have joined, but it was our motion at that point. There is no representation question here. And the concept—the concepts are not inconsistent at all. ALPA is enforcing its letter agreement, its collective bargaining agreement.

The fact that some payments may go to retirees and some payments may go to actives doesn't change—absent any kind of distinction in the agreement itself, the operative language that we are dealing with here, and there is none, this is a matter of ALPA as the bargaining representative enforcing its agreement.

It is very different from the concept of ALPA's position negotiated on behalf of active employees, active pilots, excuse me, in representing the active pilots and not representing as a collective bargaining matter in the negotiations the retired pilots.

[12] THE COURT: All right. What I am going to do is to simply continue to apply the law that I announced in February. Now, if you want to appeal this order, Mr. Seligman, I will allow you to do that by putting these funds in escrow so that they will be available to be paid to the retirees in the event that you are not successful in the appeal. I don't believe that that arrangement would cause irreparable injury. But if you do not choose to appeal this, then I am going to be consistent and you will be obligated to make the payments.

MR. CARRIGLIO: Thank you, Your Honor.

MR. SELIGMAN: Thank you, Your Honor.

THE COURT: The motion is granted.

You know, I want to give you an opportunity, Mr. Seligman, to determine whether you want to appeal it, and so I will make this order effective the close of business tomorrow.

APPENDIX M

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Chapter II
Case No. 02 B 48191
(Jointly Administered)

In re: UAL CORPORATION, *et al.*,
Debtors.

ORDER GRANTING THE EMERGENCY MOTION OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL PURSUANT TO 11 U.S.C. SECTION 1113(f) TO COMPEL CONTINUED PAYMENT OF NON-QUALIFIED PENSION BENEFITS UNDER THE PILOTS' COLLECTIVE BARGAINING AGREEMENT

The Emergency Motion of Air Line Pilots Association, International pursuant to 11 U.S.C. Section 1113(f) to Compel Continued Payment of Non-Qualified Pension Benefits under the Pilots' Collective Bargaining Agreement came before the Court on February 18, 2005. Upon consideration of the undisputed facts, the arguments of the parties and the applicable law, and for the reasons set forth on the record in open court,

IT IS HEREBY ORDERED that:

1. The motion is GRANTED.

2. Debtors shall continue payment of non-qualified benefits (as described in the motion) until the A Plan is terminated pursuant to applicable law or the parties agree otherwise.

3. Notwithstanding the possible applicability of Bankruptcy Rule 7062 or any other rule that would provide for a stay, the terms of this Order shall he immediately effective and enforceable upon its entry.

Dated: February 18, 2005

/s/ Eugene R. Wedoff
EUGENE R. WEDOFF
United States Bankruptcy Judge

APPENDIX N

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 B 48191

In re: UAL CORPORATION, *et al.*,
Debtors.

Chicago, Illinois
February 18, 2005
9:30 a.m.

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE EUGENE R. WEDOFF

APPEARANCES:

MR. JAMES SPRAYREGEN
MR. MARC KIESELSTEIN
MR. DAVID SELIGMAN
MR. CHRIS HECK
on behalf of the debtors;

MS. MORGAN BRAZIL
on behalf of UAL;

MR. ANDREW ROSENMAN
on behalf of UAL Loyalty Services;

MR. JAMES SPIOTTO
on behalf of U.S. Bank as trustee and
the Bank of New York as trustee;

MR. STEVE PATTON
MR. ERIC CHALUT
MR. MARC CARMEL
on behalf of United Airlines;

MR. SCOTT SOLBERG
on behalf of Bank of New York;

MR. RONALD BARLIANT
MR. MIKE GASS
on behalf of U.S. Bank;

MR. PAUL SLATER
on behalf of the unsecured creditors committee;

MR. JACK CARRIGLIO
MR. ERIC NEWMAN
on behalf of the retired pilots;

MS. BABETTE CECCOTTI
on behalf of the Air Line Pilots Association;

MR. JOHN MENKE
on behalf of the Pension Benefit Guaranty Corporation

* * * *

[147] THE COURT: Let us then take up first the [148] ALPA collective bargaining matter that was left over from this morning. ALPA's motion to compel payment of nonqualified pension benefits in United's response to that motion raise a number of questions. The first, resolved prior to the lunch break, was whether ALPA was required to arbitrate the question of whether the CBA between ALPA and United might be read to allow termination of these benefit payments upon a notice of termination by the PBGC of the defined benefit plan giving rise to the benefits. As discussed this morning, United's position here lacks a colorable basis.

The CBA includes provisions requiring the payment of the nonqualified benefits with no exception for periods during which a notice of termination is pending but not yet effective. With the termination of qualified benefits, the derivative obligation to pay nonqualified benefits would likewise terminate. But until that termination actually occurs, irrespective of any retroactive effective date, the obligation to make payment of nonqualified benefits is present under the CBA. A denial of that obligation by United would be a modification of the CBA prohibited under Section 1113.

[149] That determination leaves open the question of whether the obligation to make payment of nonqualified benefits under the CBA must be treated as currently payable administrative claims or whether it might be characterized as an unsecured claim with lower priority. The parties have cited conflicting case law on the subject, which I have briefly reviewed over the break. But in the end, it is not necessary to resolve the dispute among the cases in order to rule on the pending motion.

At the outset of this case, United obtained approval of a motion to make payment of the nonqualified benefits pursuant to Section 363 of the Bankruptcy Code on the ground that even if these payments were not required, paying them outside of the ordinary course would benefit the debtors' estate. Thus, unquestionably, United had and has discretion to pay the benefits, and has done so consistently since the outset of the case.

United is currently involved in a second round of modifications to its collective bargaining agreements seeking wage concessions from its union employees in addition to those affected by an earlier round of modifications, but also, and of much greater financial impact, seeking termination [150] of defined benefit pension plans.

In connection with this second round of modifications, United and ALPA reached agreement on a modified CBA

dealing with both wage concessions and pension plan termination. The agreement was subject to extensive negotiation and, after the court initially failed to approve it, renegotiation. It is very unlikely that any of the language of the agreement would have been entered into without careful consideration.

The modified agreement uses the term, quote, "the A plan," close quote, to refer to the plan under which the nonqualified benefits at issue here are payable. The agreement deals with this plan in Section 4, which sets out detailed terms under which United may seek termination of the plan. Among them, that United may not seek termination prior to April 11, 2005, if it wishes to obtain a waiver from ALPA of its right to object that termination would violate the CBA.

Critically, Section 4(c) of the agreement provides that unless United obtains court approval of a request to terminate the plan, quote, "the A plan shall remain in full force and effect," close quote. In the context of the parties' [151] carefully bargained-for agreement, this provision can only reasonably be interpreted to require United to continue making the payments called for by the plan. Any cessation of payments by United of nonqualified benefits would not, quote, "continue," close quote, the full effect of the plan.

Thus, in entering into the modified CBA, United committed to continue making the payments at issue here. Whether this was an agreement to use the discretion accorded under Section 363 or whether the agreement merely confirmed an obligation otherwise arising under applicable bankruptcy law is an issue that need not be determined.

ALPA's motion to require a payment of the nonqualified benefits pending actual termination of the defined benefit plan is granted and an order can be entered to that effect. And, again, I can simply enter that order.

* * * *

APPENDIX O

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 13, 2006

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

Nos. 06-1867, 06-2662, 06-2714 & 06-2843

IN THE MATTER OF:
UAL CORPORATION (PILOTS' PENSION PLAN TERMINATION)

APPEALS OF:
UNITED AIRLINES, INC.; PENSION BENEFIT GUARANTY CORPORATION; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; AND UNITED RETIRED PILOTS BENEFIT PROTECTION ASSOCIATION, *et al.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 05 C 6220 John W. Darrah, Judge and
No. 06 C 1222 Joan Humphrey Lefkow, Judge

Order

The Air Line Pilots Association, International filed a petition for rehearing in No. 06-1867 on November 7, 2006. All of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX P

28 U.S.C. § 158 Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

(A) there are insufficient judicial resources available in the circuit; or

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11. Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2)(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)(1) Subject to subsections (b) and (d)(2), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless—

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal;

to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal in pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

APPENDIX Q

29 U.S.C. § 1342 Institution of termination proceedings by the corporation

(a) Authority to institute proceedings to terminate a plan

The corporation may institute proceedings under this section to terminate a plan whenever it determines that—

(1) the plan has not met the minimum funding standard required under section 412 of Title 26, or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of Title 26 has been mailed with respect to the tax imposed under section 4971(a) of Title 26,

(2) the plan will be unable to pay benefits when due,

(3) the reportable event described in section 1343(c)(7) of this title has occurred, or

(4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

The corporation shall as soon as practicable institute proceedings under this section to terminate a single-employer plan whenever the corporation determines that the plan does not have assets available to pay benefits which are currently due under the terms of the plan. The corporation may prescribe a simplified procedure to follow in terminating small plans as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c) of this section). Notwithstanding any other provision of this subchapter, the corporation is authorized to pool assets of terminated plans for purposes of administration, investment, payment of liabilities of all such terminated plans, and such other purposes as it determines to be appropriate in the administration of this subchapter.

(b) Appointment of trustee

(1) Whenever the corporation makes a determination under subsection (a) of this section with respect to a plan or is required under subsection (a) of this section to institute proceedings under this section, it may, upon notice to the plan, apply to the appropriate United States district court for the appointment of a trustee to administer the plan with respect to which the determination is made pending the issuance of a decree under subsection (c) of this section ordering the termination of the plan. If within 3 business days after the filing of an application under this subsection, or such other period as the court may order, the administrator of the plan consents to the appointment of a trustee, or fails to show why a trustee should not be appointed, the court may grant the application and appoint a trustee to administer the plan in accordance with its terms until the corporation determines that the plan should be terminated or that termination is unnecessary. The corporation may request that it be appointed as trustee of a plan in any case.

(2) Notwithstanding any other provision of this subchapter—

(A) upon the petition of a plan administrator or the corporation, the appropriate United States district court may appoint a trustee in accordance with the provisions of this section if the interests of the plan participants would be better served by the appointment of the trustee, and

(B) upon the petition of the corporation, the appropriate United States district court shall appoint a trustee proposed by the corporation for a multiemployer plan which is in reorganization or to which section 1341a(d) of this title applies, unless such appointment would be adverse to the interests of the plan participants and beneficiaries in the aggregate.

(3) The corporation and plan administrator may agree to the appointment of a trustee without proceeding in accordance with the requirements of paragraphs (1) and (2).

(c) Adjudication that plan must be terminated

(1) If the corporation is required under subsection (a) of this section to commence proceedings under this section with respect to a plan or, after issuing a notice under this section to a plan administrator, has determined that the plan should be terminated, it may, upon notice to the plan administrator, apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund. If the trustee appointed under subsection (b) of this section disagrees with the determination of the corporation under the preceding sentence he may intervene in the proceeding relating to the application for the decree, or make application for such decree himself. Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under subsection (b) of this section (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan in accordance with the provisions of this subtitle. If the corporation and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee without proceeding in accordance with the requirements of this subsection (other than this sentence) the trustee shall have the power described in subsection (d)(1) of this section and, in addition to any other duties imposed on the trustee under law or by agreement between the corporation and the plan administrator, the trustee is subject to the duties described in subsection (d)(3) of this section. Whenever a trustee appointed under this subchapter is operating a plan with discretion as to the date upon which final distribu-

tion of the assets is to be commenced, the trustee shall notify the corporation at least 10 days before the date on which he proposes to commence such distribution.

(2) In the case of a proceeding initiated under this section, the plan administrator shall provide the corporation, upon the request of the corporation, the information described in clauses (ii), (iii), and (iv) of section 1341(c)(2)(A) of this title.

(3) Disclosure of termination information

(A) In general

(i) Information from plan sponsor or administrator

A plan sponsor or plan administrator of a single-employer plan that has received a notice from the corporation of a determination that the plan should be terminated under this section shall provide to an affected party any information provided to the corporation in connection with the plan termination.

(ii) Information from corporation

The corporation shall provide a copy of the administrative record, including the trusteeship decision record of a termination of a plan described under clause (i).

(B) Timing of disclosure

The plan sponsor, plan administrator, or the corporation, as applicable, shall provide the information described in subparagraph (A) not later than 15 days after—

(i) receipt of a request from an affected party for such information; or

(ii) in the case of information described under subparagraph (A)(i), the provision of any new information to the corporation relating to a previous request by an affected party.

(C) Confidentiality

(i) In general

The plan administrator and plan sponsor shall not provide information under subparagraph (A)(i) in a form which includes any information that may directly or indirectly be associated with, or otherwise identify, an individual participant or beneficiary.

(ii) Limitation

A court may limit disclosure under this paragraph of confidential information described in section 552(b) of Title 5, to authorized representatives (within the meaning of section 1341(c)(2)(D)(iv) of this title) of the participants or beneficiaries that agree to ensure the confidentiality of such information.

(D) Form and manner of information; charges

(i) Form and manner

The corporation may prescribe the form and manner of the provision of information under this paragraph, which shall include delivery in written, electronic, or other appropriate form to the extent that such form is reasonably accessible to individuals to whom the information is required to be provided.

(ii) Reasonable charges

A plan sponsor may charge a reasonable fee for any information provided under this paragraph in other than electronic form.

(d) Powers of trustee

(1)(A) A trustee appointed under subsection (b) of this section shall have the power—

(i) to do any act authorized by the plan or this subchapter to be done by the plan administrator or any trustee of the plan;

(ii) to require the transfer of all (or any part) of the assets and records of the plan to himself as trustee;

(iii) to invest any assets of the plan which he holds in accordance with the provisions of the plan, regulations of the corporation, and applicable rules of law;

(iv) to limit payment of benefits under the plan to basic benefits or to continue payment of some or all of the benefits which were being paid prior to his appointment;

(v) in the case of a multiemployer plan, to reduce benefits or suspend benefit payments under the plan, give appropriate notices, amend the plan, and perform other acts required or authorized by subtitle (E) of this subchapter to be performed by the plan sponsor or administrator;

(vi) to do such other acts as he deems necessary to continue operation of the plan without increasing the potential liability of the corporation, if such acts may be done under the provisions of the plan; and

(vii) to require the plan sponsor, the plan administrator, any contributing or withdrawn employer, and any employee organization representing plan participants to furnish any information with respect to the plan which the trustee may reasonably need in order to administer the plan.

If the court to which application is made under subsection (c) of this section dismisses the application with prejudice, or if the corporation fails to apply for a decree under subsection (c) of this section, within 30 days after the date on which the trustee is appointed under subsection (b) of this section, the trustee shall transfer all assets and records of the plan held by him to the plan administrator within 3 business days after such dismissal or the expiration of such

30-day period, and shall not be liable to the plan or any other person for his acts as trustee except for willful misconduct, or for conduct in violation of the provisions of part 4 of subtitle B of subchapter I of this chapter (except as provided in subsection (d)(1)(A)(v) of this section). The 30-day period referred to in this subparagraph may be extended as provided by agreement between the plan administrator and the corporation or by court order obtained by the corporation.

(B) If the court to which an application is made under subsection (c) of this section issues the decree requested in such application, in addition to the powers described in subparagraph (A), the trustee shall have the power--

(i) to pay benefits under the plan in accordance with the requirements of this subchapter;

(ii) to collect for the plan any amounts due the plan, including but not limited to the power to collect from the persons obligated to meet the requirements of section 1082 of this title or the terms of the plan;

(iii) to receive any payment made by the corporation to the plan under this subchapter;

(iv) to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan;

(v) to issue, publish, or file such notices, statements, and reports as may be required by the corporation or any order of the court;

(vi) to liquidate the plan assets;

(vii) to recover payments under section 1345(a) of this title; and

(viii) to do such other acts as may be necessary to comply with this subchapter or any order of the court and to protect the interests of plan participants and beneficiaries.

(2) As soon as practicable after his appointment, the trustee shall give notice to interested parties of the institution of proceedings under this subchapter to determine whether the plan should be terminated or to terminate the plan, whichever is applicable. For purposes of this paragraph, the term "interested party" means—

(A) the plan administrator,

(B) each participant in the plan and each beneficiary of a deceased participant,

(C) each employer who may be subject to liability under section 1362, 1363, or 1364 of this title,

(D) each employer who is or may be liable to the plan under section [FN1] part 1 of subtitle E of this subchapter,

(E) each employer who has an obligation to contribute, within the meaning of section 1392(a) of this title, under a multiemployer plan, and

(F) each employee organization which, for purposes of collective bargaining, represents plan participants employed by an employer described in subparagraph (C), (D), or (E).

(3) Except to the extent inconsistent with the provisions of this chapter, or as may be otherwise ordered by the court, a trustee appointed under this section shall be subject to the same duties as those of a trustee under section 704 of Title 11, and shall be, with respect to the plan, a fiduciary within the meaning of paragraph (21) of section 1002 of this title and under section 4975(e) of Title 26 (except to the extent that the provisions of this subchapter are inconsistent with the requirements applicable under part 4 of subtitle B of subchapter I of this chapter and of such section 4975).

(e) Filing of application notwithstanding pendency of other proceedings

An application by the corporation under this section may be filed notwithstanding the pendency in the same or any other court of any bankruptcy, mortgage foreclosure, or equity receivership proceeding, or any proceeding to reorganize, conserve, or liquidate such plan or its property, or any proceeding to enforce a lien against property of the plan.

(f) Exclusive jurisdiction; stay of other proceedings

Upon the filing of an application for the appointment of a trustee or the issuance of a decree under this section, the court to which an application is made shall have exclusive jurisdiction of the plan involved and its property wherever located with the powers, to the extent consistent with the purposes of this section, of a court of the United States having jurisdiction over cases under chapter 11 of Title 11. Pending an adjudication under subsection (c) of this section such court shall stay, and upon appointment by it of a trustee, as provided in this section such court shall continue the stay of, any pending mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the plan or its property and any other suit against any receiver, conservator, or trustee of the plan or its property. Pending such adjudication and upon the appointment by it of such trustee, the court may stay any proceeding to enforce a lien against property of the plan or any other suit against the plan.

(g) Venue

An action under this subsection may be brought in the judicial district where the plan administrator resides or does business or where any asset of the plan is situated. A district court in which such action is brought may issue process with respect to such action in any other judicial district.

(h) Compensation of trustee and professional service personnel appointed or retained by trustee

(1) The amount of compensation paid to each trustee appointed under the provisions of this subchapter shall require the prior approval of the corporation, and, in the case of a trustee appointed by a court, the consent of that court.

(2) Trustees shall appoint, retain, and compensate accountants, actuaries, and other professional service personnel in accordance with regulations prescribed by the corporation.

APPENDIX R

29 U.S.C. § 1348 Termination date

(a) For purposes of this subchapter the termination date of a single-employer plan is—

(1) in the case of a plan terminated in a standard termination in accordance with the provisions of section 1341(b) of this title, the termination date proposed in the notice provided under section 1341(a)(2) of this title,

(2) in the case of a plan terminated in a distress termination in accordance with the provisions of section 1341(c) of this title, the date established by the plan administrator and agreed to by the corporation,

(3) in the case of a plan terminated in accordance with the provisions of section 1342 of this title, the date established by the corporation and agreed to by the plan administrator, or

(4) in the case of a plan terminated under section 1341(c) or 1342 of this title in any case in which no agreement is reached between the plan administrator and the corporation (or the trustee), the date established by the court.

(b) For purposes of this subchapter, the date of termination of a multiemployer plan is--

(1) in the case of a plan terminated in accordance with the provisions of section 1341a of this title, the date determined under subsection (b) of that section; or

(2) in the case of a plan terminated in accordance with the provisions of section 1342 of this title, the date agreed to between the plan administrator and the corporation (or the trustee appointed under section 1342(b)(2) of this title, if any), or, if no agreement is reached, the date established by the court.

ALPA Exhibit 27

ALPA News Release

Release #04.UAL6
December 30, 2004

Statement by the United Master Executive Council, Air Line Pilots Association Regarding Today's Action by The Pension Benefit Guarantee Corporation

"We deplore the PBGC's ill-timed attempt to retaliate against the United pilot group in the United bankruptcy proceeding.

ALPA's tentative agreement with United does not permit the termination of the pilot pension plan without a final judicial determination that pension termination is necessary for the Company to emerge from bankruptcy or at any point prior to May 1, 2005. As the PBGC is well aware, there are no grounds for the termination of the pilot pension plan.

ALPA will vigorously oppose any effort by the PBGC to take over the plan before May 1, 2005 or to single out the pilot group for punitive and vindictive treatment in the United bankruptcy. Under the terms of the tentative pilot agreement, the Company has also agreed to oppose any attempt to terminate the pilot pension plan prior to May 1, 2005.

In addition, the tentative pilot agreement requires United to continue the pilot pension plan if any other United employee group maintains a defined benefit pension program following the bankruptcy. We will vigorously enforce that right against the PBGC or any other party that seeks to single out the pilot group for unfair treatment in the bankruptcy proceeding.

We are equally concerned about the timing of the PBGC action in the midst of a pilot membership vote over the tentative pilot agreement. We question whether the PBGC's action may be designed to confuse the pilot group, undermine the membership ratification process and deprive the pilots of the benefits and protections of the tentative agreement. If so, today's action is an outrageous ploy by the PBGC to harm the very employee interests that the agency is sworn to protect.

The pilots of United Airlines are critical to the reorganization of this Company and, by far have sacrificed the most to save the airline. We demand to be recognized and compensated for our unique contributions, and we will take every lawful action necessary to protect the interests of the United pilots against the PBGC or any other party in this proceeding."

###

Contacts:

Dave Kelly	Captain Herb Hunter	Captain Steve Derebey
847/292-1708	954/757-4067	815/341-4629

12-30-04: Statement from Captain Duane Woerth, ALPA President, on United Pilot Pensions